This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

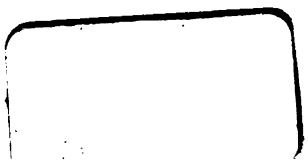
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Digitized by Google



Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

BB
AFV
EKe 3

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

A TREATISE

ON THE

LAW OF EXECUTIONS

IN CIVIL CASES,

AND OF

PROCEEDINGS IN AID AND RESTRAINT THEREOF

BY

ABRAHAM CLARK FREEMAN,

AUTHOR OF A TREATISE ON THE LAW OF JUDGMENTS, AND ALSO OF A TREATISE ON THE LAW OF COTENANCY AND PARTITION.

Executio est fructus et finis legis.

VOL. II.

THIRD EDITION.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS,
1900.

Digitized by Google

Copyright, 1876,
BY A. C. FREEMAN.

Copyright, 1888,
BY A. C. FREEMAN.

Copyright, 1900,
BY A. C. FREEMAN.

L 5512

MAR 2 1932

Digitized by Google

LAW OF EXECUTIONS.

VOL. II.

Digitized by Google

Digitized by Google

CHAPTER XII.

REAL PROPERTY SUBJECT TO EXECUTION.

FIRST—OF REAL ESTATE HELD BY LEGAL TITLES.

§ 172. General rule respecting.
§ 172a. Uncertain and contingent estates.
§ 172b. Cotenant's interest.
§ 173. Naked legal titles.
§ 174. Title without possession.
§ 175. Possession without title.
§ 176. Interests acquired from the government.
§ 177. Estates at will.
§ 178. Estates in remainder or reversion.
§ 179. Franchises.
§ 180. Effect of sale of franchise.
§ 181. Interest of a vendor before conveyance.
§ 182. Interest of defendant in execution before conveyance and after sale.
§ 183. Interest of heir or devisee before final distribution.
§ 184. Interest of mortgagee before foreclosure.
§ 185. Interest of a dowress before assignment.
§ 186. Interest of husband as tenant by curtesy or by entirety.

SECOND.—OF EQUITABLE TITLES TO REAL ESTATE.

§ 187. Trust estates at common law, and under statute 29 Charles II.
§ 188. Trust estates under American statutes.
§ 189. Resulting trusts.
§ 189a. Devises and trusts to withdraw property from execution.
§ 190. Mortgagor's equity of redemption.
§ 191. Equity of redemption, where execution is for mortgage debt.
§ 192. Equity of redemption under deeds intended as mortgages.
§ 193. Interest of purchaser at execution sale before conveyance.
§ 194. Interest of purchaser at voluntary sale before conveyance.

§ 172. General Rule Respecting.—Lands were not, by the common law of England, subject to execution for

Digitized by Google

the debt of any private citizen. "This rule was considered as a fair and necessary result from the nature of the feudal tenures, according to which all the lands in that country were held. In the case of the king, however, an execution always issued against the lands as well as the goods of a public debtor, because the debtor was considered as being not only bound in person, but as a feudatory, who held mediately or immediately from the king, and, therefore, holding what he had from the king, he was from thence to satisfy what he owed the king." [1] "By an English statute, passed in the year 1285, Westminster 2, chapter 18, lands were partially subjected to be taken in execution under an elegit, and held until the debt should be levied upon a reasonable price or extent." [2]

Under the influence of the English statutes, and of the various statutes upon the subject in force in this country, as a general rule all legal estates in land may be sold under an execution or extended under an elegit. "All lands of the defendant are liable to be extended, whether he hath an estate in fee, in tail, for life, or for years; but copyhold lands, or a lease of copyhold lands, are not extendible on an elegit as part of the realty. But lands held in ancient demesne may be extended and delivered over on an elegit." [3] It is ordinarily sufficient to inquire whether the interest sought to be sold is real property, and, if so, whether the defendant in execution has a legal estate therein. These questions

[1] Jones v. Jones, 1 Bland, 443, 18 Am. Dec. 327.

[2] Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350; Coombs v. Jordan, 3 Bland, 284, 22 Am. Dec. 236; Drayton v. Marshall, Rice Eq. 373, 33 Am. Dec. 84; Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

[3] Watson on Sheriffs, 208.

Digitized by Google

being answered in the affirmative, the property, or the defendant's estate therein, must be regarded as subject to execution unless it falls within some exception hereinafter stated.[4] Therefore, if the defendant has the right to occupy a designated box in a theater,[5] or a stall in a market,[6] these rights are subject to execution against him. A rent-charge may be taken in execution as real estate,[7] though a rent-seck cannot.[8] It is not clear whether an advowson could be extended under an elegit or not.[9] A life estate was, no doubt, subject to execution at common law, and also under the statutes of nearly all of the United States;[10] but a different rule formerly prevailed in Pennsylvania.[11] Leasehold estates are also unquestionably subject to execution, though there may be some question whether they should be levied upon as real or as personal property. Under the statutes of Ohio a permanent lease-

[4] Stock Growers Bank v. Newton, 13 Colo. 245; Eneberg v. Carter, 98 Mo. 647, 14 Am. St. Rep. 664; Schenck v. Barnes, 49 N. Y. Supp. 222; Wieters v. Timmons, 25 S. C. 488.

[5] Title G. Co. v. Northern etc. I. Trust, 73 Fed. Rep. 931.

[6] Green v. Western N. B., 86 Md. 279.

[7] Dougall v. Turnbull, 10 U. C., Q. B. 121; Hurst v. Lithgrow, 2 Yeates, 25, 1 Am. Dec. 326; Wotton v. Shirt, Cro. Eliz. 742; Watson on Sheriffs, 208; People v. Haskins, 7 Wend. 463. But this case seems to be overruled by Payn v. Beal, 4 Denio, 405; Huntington v. Forkson, 6 Hill, 149.

[8] Dougall v. Turnbull, 8 U. C. Q. B. 622; Walsal v. Heath, Cro. Eliz. 656.

[9] Robinson v. Tonge, 3 P. Wms. 401; Watson on Sheriffs, 208.

[10] Westervelt v. People, 20 Wend. 416; Fitzhugh v. Hellen, 3 Har. & J. 206; Poyce v. Waller, 2 B. Mon. 91; Mendenhall v. Randon, 3 Stew. & P. 251; Hitchcock v. Hotchkiss, 1 Conn. 470; Bozeman v. Bishop, 94 Ga. 459; Thompson v. Murphy, 10 Ind. App. 464.

[11] Howell v. Wolfert, 2 Dall. 75; Near v. Watts, 8 Watts, 319; Snavely v. Wagner, 3 Pa. St. 275, 45 Am. Dec. 640; Eyrick v. Hetrick, 13 Pa. St. 488; Commonwealth v. Allen, 30 Pa. St. 49; Shelton v. Codman, 3 Cush. 318; Thomas v. Blackmore, 5 Yerg. 113.

Digitized by Google

hold, or, in other words, a lease renewable forever at the option of the lessee or his successors, is an interest in real property, and subject to execution as such.[12] It is difficult to understand the decisions in Pennsylvania upon this subject. In Titusville N. I. Works' Appeal, 77 Pa. St. 103, the court said: "A lease of land, during the term, is as fixed as the land itself, for it can only be used upon the land out of which it arises. It is nothing more or less than the right to use the freehold for the term mentioned in the lease. It is therefore an estate in land. These chattels cannot be seized and held as can personal goods which accompany the person, and are susceptible of transportation from place to place;" and for these reasons a levy made in the manner appropriate for a levy upon real property was sustained. This decision, or, more accurately speaking, some of the language used in the opinion, is, however, inconsistent with prior decisions of the same court, which it did not profess to overrule,[13] and with a subsequent decision which does not profess to overrule it.[14] Probably the rule deducible from these apparently conflicting opinions is, that though a leasehold interest is a chattel, yet it is not subject to seizure as are other chattels, and, hence, that a levy upon it may be made without taking possession of the property levied upon. In an early case in Connecticut, in determining that the interest there in question could be appraised and set aside under execution as real property, the court said: "An estate in lands for nine hundred

[12] Northern Bank v. Roosa, 13 Oh. 334; Loring v. Melendy, 11 Oh. 355; McLean v. Roekey, 3 McLean, 235.

[13] Dalzell v. Lynch, 4 W. & S. 256; Williams v. Downing, 18 Pa. St. 60.

[14] Kile v. Giebner, 114 Pa. St. 381.

Digitized by Google

and ninety years is most certainly not personal estate. It cannot, therefore, be sold at the post at public vendue by an officer upon execution. It is then to be considered as real estate, and is in fact a much greater estate than an estate for life; it approximates the nearest to a fee in point of duration and in point of importance and value; and, if it may not be taken to satisfy an execution in this way, there is no way pointed out in the law whereby it can, and all reasons in the law why land and real estate should be appraised operate forcibly with respect to this kind of estate." [15]

Where the statute provides for a mode of levying on or selling "chattels real," a lease of lands for a term of years, with the right to dig for and remove coal during the term of the lease, and to construct all necessary buildings, must be levied on and sold as a chattel real. "Chattels real are interests annexed to or concerning the realty, as a lease for years of the land; and the duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee to some other person." [16] In the absence of any special statute upon the subject, we think the weight of authority in favor of the proposition that a leasehold interest in lands must be levied upon and sold as an estate in personal property.[17]

Lands devoted to the use of the public are not subject to execution. This rule applies to all lands used by the state, or by any county or city thereof for specific public uses; as for state houses, streets, public

[15] Mun v. Carrington, 2 Root, 15.

[16] Hyatt v. Vincennes Bank, 113 U. S. 408.

[17] Barr v. Doe, 6 Blackf. 335, 38 Am. Dec. 146; Coombs v. Jordan, 3 Bland, 284, 22 Am. Dec. 236; Buhl v. Kenyon, 11 Mich. 249.

Digitized by Google

squares, charity hospitals, and the like.[18] There is probably no circumstance or condition under which lands belonging to the state can be subjected to execution, though it has, by law, authorized suits to be brought against it and judgments to be entered therein.[19] The property of counties, cities, and other municipal corporations is usually held in trust for public purposes, and unless it clearly appears that real property belongs to them in their private, rather than in their governmental or public, capacity, it is not subject to execution.[20] The real property of a city may, however, be subjected to execution against it when not held in trust for any public purpose and employed solely as a private proprietor would employ like property.[21] Churches, though devoted to public uses, are private property, liable to be seized and sold to pay the debts of their owners.[22] At common law, neither a church-yard, nor the glebe of a parsonage or vicarage, could be extended under an elegit. They were regarded as solemnly consecrated to God and religion.[23] A sentiment of reverence toward the graves of companions and ancestors would certainly go far toward impelling the courts in this country to hold that a church-yard, used as a cemetery, is not subject to execution.[24]

[18] State v. Finlay, 33 La. Ann. 113; Leonard v. Reynolds, 14 N. Y. Sup. Ct. 73.

[19] Carter v. State, 42 La. Ann. 927, 21 Am. St. Rep. 404.

[20] Oakland v. Oakland Water Front Co., 118 Cal. 160; Flora v. Naney, 136 Ill. 45; City of Sherman v. Williams (Tex.), 19 S. W. 606; New Orleans v. Louisiana C. Co., 140 U. S. 654.

[21] Mayor of Birmingham v. Rumsey, 63 Ala. 352; Murphree v. Mobile, 108 Ala. 663.

[22] Presbyterians v. Colt, 2 Grant Cas. 75.

[23] Watson on Sheriffs, 208; Arbuckle v. Cowtan, 3 Bos. & P. 327.

[24] Brown v. Lutheran Church, 23 Pa. St. 500.

Digitized by Google

The right to subject real property to execution is not dependent upon the character or capacity of the persons, whether natural or artificial, to whom it may belong, except that they must be persons against whom a judgment may properly be enforced and its payment coerced, and they must have a beneficial interest in the property, and not hold it merely upon some trust, public or private. There are, indeed, instances in which real property is subject to execution against a defendant, though others than he have an interest therein. Thus, in some of the states, property acquired by a husband and wife after marriage, otherwise than by gift or descent, belongs to them as community assets. Nevertheless, under a judgment against the husband alone, all the interest of both in such property is subject to execution.[25] If a judgment is recovered against a married woman, or against her and her husband, and is valid by the laws of the state, her separate property may be taken to satisfy it.[26]

In treating of personal property subject to execution, we have shown that transfers thereof, made for the purpose of hindering, delaying, or defrauding creditors, are void as against them, and that they may, therefore, levy such writs upon such property while in the hands of the fraudulent transferee, or of a person acquiring title or possession from or under him, without consideration, or with notice of the fraud, precisely as if such transfer had not been made. This rule is equally applicable to real property. Though it has

[25] Blum v. Rogers, 71 Tex. 668; Powell v. Pugh, 13 Wash. 577; Morse v. Estabrook, 19 Wash. 92, 67 Am. St. Rep. 723.

[26] Merrill v. City of St. Louis, 83 Mo. 244, 53 Am. Rep. 576; Burdick v. Burdick, 16 R. I. 495; Gill v. State, 39 W. Va. 479, 45 Am. St. Rep. 928.

Digitized by Google

been made the subject of a fraudulent transfer, still, in contemplation of law, as between the fraudulent grantor and grantee and the creditors of the former, no transfer has been made, and they may therefore levy upon it under a writ against him.[27]

While real estate may in equity be regarded as belonging to a partnership, such is not the case at law. It is there deemed to belong to the several partners as cotenants. It is subject to execution under writs against the partners, or either of them, to the same extent as lands held by tenants in common are subject to execution against the cotenants, or either of them, though the equities of the partnership therein may be enforced, and the effect of executions against the partners individually be limited, by appropriate proceedings in chancery.[28]

§ 172a. Uncertain and Contingent Estates may be divided into two classes: 1. Those of which the debtor is seised, or in which he has some interest at the present time, but of which his seisin or interest is liable to be divested upon the happening of some future event; and 2. Those in which the debtor has no present seisin or interest, but to which he may become entitled upon some future, uncertain contingency. In the cases of

[27] High v. Nelms, 14 Ala. 350, 48 Am. Dec. 103; Staples v. Bradley, 23 Conn. 167; Reel v. Livingston, 34 Fla. 377, 43 Am. St. Rep. 202; Willard v. Masterson, 160 Ill. 443; Fuller v. Pinson, 98 Ky. 441; Foley v. Bitter, 34 Md. 646; Pratt v. Wheeler, 6 Gray, 520; McArthur v. Oliver, 60 Mich. 605; Woodward v. Maslin, 106 Mo. 324; Russell v. Dyer, 33 N. H. 186; Fowler v. Trebein, 16 Oh. St. 493, 91 Am. Dec. 95; Bank of Colfax v. Richardson (Or.), 54 Pac. 359.

[28] Golden State etc. Works v. Davidson, 73 Cal. 389; Price v. Hicks, 14 Fla. 565; Bopp v. Fox, 63 Ill. 546; Peck v. Fisher, 7 Cush. 386; note to Smith v. Smith, 43 Am. St. Rep. 377-380.

Digitized by Google

the first class, his interest, if a legal one, is subject to execution. Hence, if the defendant is seised of an estate defeasible upon the contingency of his dying without issue living at the time of his decease, he has a present estate "liable to be taken in execution and held by the creditor until the happening of the contingency." [29] Upon the same principle, if an executor or trustee becomes a purchaser at a sale, which the heir or cestui que trust may elect to avoid, he has, in the absence of such election, an estate subject to execution.[30] So one who purchases lands from a state, under a contract which provides for certain stated payments, upon the making of which he will become entitled to a patent, and upon default in any of which he forfeits all rights under his contract, has a vendible interest in such lands prior to their forfeiture, and one which is subject to execution.[31] If the estate of the defendant in execution is terminable upon any contingency, or upon the election of another person, the happening of the contingency, or the exercise of the right of election, necessarily terminates the right to subject the property to execution.[32] The estate acquired under the levy of an execution in this and similar cases is, of course, no better or more certain an estate than that held by the judgment debtor, and remains liable to be defeated by the same contingency to which it was subject before the execution sale.[33] There may also be cases in which the contingency upon which the estate is held forbids

[29] Phillips v. Rogers, 12 Met. 405; Stevens v. Mulligan, 167 Mass. 84.

[30] Thornton v. Willis, 65 Ga. 184.

[31] McWilliams v. Withington, 7 Saw. 205, 7 Fed. Rep. 326.

[32] Bayer v. Walsh, 166 Pa. St. 38; Durr v. Replogle, 167 Pa. St. 347.

[33] Thomas v. Record, 47 Me. 500, 74 Am. Dec. 500.

Digitized by Google

its being taken in execution, though before the happening of the contingency, or, at least, requires any sale which may be made to be subordinate to the rights of the person who is entitled to insist upon the vesting of the title on the happening of the contingency. Thus, if property is conveyed to be held by the grantee so long as he shall support the grantor, it is evident that the latter retains a beneficial interest in the property, and that it ought not to be held subject to execution against the grantee, unless upon such terms as shall fully protect the interests of the grantor.[34]

It is equally clear that in cases of the second class, there is no estate or interest subject to execution.[35] A judgment debtor having a right to enter for condition broken,[36] or to disaffirm a conveyance made by him while a minor,[37] is not seised of any present estate. Whether he will in future become seised of an estate is dependent upon his volition—upon the exercise of a mere personal privilege, and this privilege does not pass by an execution sale. This rule applies, though the breach of condition giving the judgment debtor a right of re-entry has taken place. Where it was claimed that the levy might be regarded as an entry, and as therefore revesting the estate in the defendant, the court said: "It would be altogether illogical to hold that the entry by the sheriff, for the purpose of

[34] McClure v. Cook, 39 W. Va. 579.

[35] Harvey v. West, 87 Ga. 553; Dodge v. Beattie, 61 N. H. 101; Young v. Young, 89 Va. 675; Smith v. Gilbert, 71 Conn. 149, 71 Am. St. Rep. 163.

[36] Bangor v. Warren, 34 Me. 324, 56 Am. Dec. 657.

[37] Kendall v. Lawrence, 22 Pick. 540.

Digitized by Google

making the levy, would serve as a substitute for entry by the grantor or his heirs. This would be to say that there was no estate for the sheriff to seize, and that still, by setting about making the seizure, the officer might bring the estate into existence. As well could we put fruit on a tree by going with a basket to gather it." [38] A conveyance of land may be procured by fraud, on account of which the grantor may have the right to proceed in equity to annul the conveyance. This right is very generally held to be a personal right, not capable of voluntary transfer,[39] and we are therefore at a loss to understand how it can be the subject of involuntary transfer, through the medium of an execution sale, even in those states where equitable interests are subject to execution. Lands so conveyed have nevertheless been held subject to execution in Missouri, upon the ground that the statute of that state subjects to execution "all interests in land, whether legal or equitable." [40] A conveyance of certain lands was made to trustees for the benefit of the creditors of a railroad company. An execution was subsequently taken out against the company, under which the lands were sold. But they were held not subject to such execution and sale, because the company had no legal title to the land, nor any equitable title, but a mere right to file a bill in equity to compel the trustees to execute the trust.[41] It is not unusual for the owner of real property by contract in writing to grant to another the

[38] Edmondson v. Leach, 56 Ga. 461.

[39] Crocker v. Bellangee, 6 Wis. 645, 70 Am. Dec. 489; M. & M. R. R. v. M. & W. R. R., 20 Wis. 183; Pomeroy's Eq. Jur., § 1275.

[40] Street v. Goss, 62 Mo. 226.

[41] Thomas v. Eckard, 88 Ill. 593.

Digitized by Google

privilege or option of purchasing it within a time and for a price specified, or of becoming the owner thereof upon the performance of some other designated condition. Such options or privileges may be of great value and subject to voluntary transfer. Doubtless, they may be reached and appropriated to the satisfaction of the debts of the beneficiary by a creditors' bill, or by supplemental proceedings. They do not appear, however, to be subject to levy under execution as real property prior to an election to exercise the option.[42]

§ 172b. The Interest of a Cotenant is always liable, by a suit in partition, to be changed from a moiety of the whole lands of the cotenancy to an estate in severalty in some specific part thereof, or to be entirely divested by a partition sale. These contingencies do not make his estate any the less subject to execution. The officer has no right to levy upon the interest of the cotenant in any specific part of the parcel levied upon.[43] Whenever a cotenant may, by his voluntary act, convey his moiety, it is subject to execution. A joint tenancy in real property may therefore be severed, and the interest of either of the cotenants taken under execution against him.[44] In Louisiana both the husband and the wife have interests in the community real property, and hence a writ against either may be levied upon his or her interest therein during the joint lives of both, and, after the death of either, the share of the

[42] Smith v. Dobbins, 87 Ga. 303; Chadbourne v. Stockton S. & L. Soc. (Cal.), 36 Pac. 127.

[43] McClellan v. Solomon, 23 Fla. 437, 11 Am. St. Rep. 381.

[44] Thornburg v. Wiggins, 135 Ind. 178, 41 Am. St. Rep. 422; Midgley v. Walker, 101 Mich. 583, 45 Am. St. Rep. 431.

Digitized by Google

survivor is subject to execution against him, and the share of the decedent to execution against his or her heirs.[45] The title of the purchaser in either event is subject to the claims of the community, where the sale was not in satisfaction of a community obligation. "In the case of an involuntary transfer of property, the interest of the person whose estate is to be divested by compulsion ought to be carefully considered and jealously guarded. If an officer may lawfully levy on a specific parcel, and subject it to forced sale, he may thereby sacrifice the property of the defendant; for few persons would be found willing to bid for that which, when purchased, consisted of a mere contingent interest—an interest which the other cotenants are not bound to notice, and which might finally be lost upon a partition of the common property. Hence, the rule, supported by a decided preponderance of the authorities, is, that a levy and sale of the debtor's interest in a specific part of the lands cannot be sustained." [46] If, however, a levy is made upon the interest of a cotenant in an entire parcel of land, it will be sustained, although the same parties are also cotenants of other parcels of land, all of which might have been united in one suit for partition. For the purposes of sale and conveyance, whether voluntary or involuntary, each distinct parcel of land is treated as forming the basis of an independent cotenancy.[47]

[45] Webre v. Lorio, 42 La. Ann. 178; Re Giddens' Succession, 48 La. Ann. 356.

[46] Freeman on Cotenancy and Partition, sec. 216. In Ohio the rule seems to be different. Treon v. Emerick, 6 Ohio St. 399.

[47] Butler v. Roys, 25 Mich. 53, 12 Am. Rep. 218; Aycock v. Kimbrough, 61 Tex. 543. Real estate continues subject to execution

Digitized by Google

As to the mode of procedure, when the writ is against two or more cotenants, it has been held that their respective interests should be treated as though they were distinct parcels of realty, and hence that they should be separately offered for sale, and that a sale as one parcel is void. These several sales were said to be necessary to enable each cotenant, or his creditors, to redeem his moiety.[48] In another case the sale of the interest of two cotenants at one bid, instead of separately, was spoken of as unusual, but it was said that the law pointed out no specific mode in which the sheriff should conduct the sale; that a sale in the manner pursued may have been beneficial, instead of injurious, to the defendants; and that, at all events, in the absence of any showing of fraud or of injury, the sale could not be treated as void.[49] We are not inclined to accept the decision that the interests of the respective defendants in the same parcel of real property must be sold separately. No authority has been cited to support it. If the judgment was against all the cotenants whose property was sold, each of them was liable for the whole debt, and it was proper to sell his interest for the whole, and neither he nor his creditors have the right to relieve the property from the whole debt by paying on redemption a moiety of the sum bid at the sale.

If real property is held by a husband and wife as tenants by the entireties, it is subject to execution to

during the pendency of proceedings for partition. Brown v. Renfro, 63 Tex. 600.

[48] Ballard v. Scruggs, 90 Tenn. 585, 25 Am. St. Rep. 708.

[49] Jones v. Lewis, 8 Ired. L. 70, 47 Am. Dec. 338.

Digitized by Google

the same extent that it is subject to voluntary alienation. We assume, though we know of no decision to that effect, that as a husband and wife may, by their joint deed, convey real property of which they are tenants by the entireties, it may, under a judgment against both, be subjected to execution. Neither can, without the joinder of the other, convey his or her moiety of the property, and what neither can do voluntarily cannot be done for him, or her, by an officer acting under execution.[50] A husband has, however, a qualified interest in the property which may be conveyed by him, and which is therefore subject to execution by him. Of this we shall speak more fully hereinafter.[51]

§ 173. Naked Legal Title.—While, as a general rule, all legal estates in land are subject to execution, the rule is not applied to the detriment of persons for whose benefit the legal estate may be held. It is only when the holder of the legal title has some beneficial interest that it can be sold under execution. If he is a mere trustee, or if, for any reason, he holds the bare legal title for the benefit of another, an execution sale against him transfers no interest whatever.[52] But

[50] McCubbin v. Stanford, 85 Md. 378, 60 Am. St. Rep. 329; Bruce v. Nicholson, 109 N. C. 202, 26 Am. St. Rep. 562; Cole M. Co. v. Collier, 95 Tenn. 115, 49 Am. St. Rep. 921; Town of Corinth v. Emery, 63 Vt. 505, 25 Am. St. Rep. 780.

[51] Post, § 186; Freeman on Cotenancy and Partition, §§ 73, 74.

[52] Bostick v. Keizer, 4 J. J. Marsh. 597, 20 Am. Dec. 237; Elliott v. Armstrong, 2 Blackf. 198; Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Campfield v. Johnson, 1 Halst. Ch. 245; Mallory v. Clark, 9 Abb. Pr. 358, 20 How. Pr. 418; Manley v. Hunt, 1 Ohio, 257; Huntt v. Townshend, 31 Md. 336; Houston v. Nowland, 7 Gill & J.

Digitized by Google

if the trustee holds for the legal benefit of himself and others, he has a beneficial interest subject to execution. The legal title "always may be bound to the extent of the beneficial interest covered by it."[53] The rule respecting the exemption from execution against the trustee of lands held in trust for another is not restricted to formal declarations of trust. It applies to all cases where, though the legal title is in the judgment debtor, he has no beneficial interest in the land. This may exist in trusts arising from operation of law, as well as in those formally declared in some declaration or conveyance.[54] Where the grantee in a deed receives it for the purpose of immediately conveying the property to another, and does so convey it—the two deeds being really parts of one and the same transaction—he has never had anything beyond a mere instantaneous seisin, and his interest, like that of the holder of the naked legal title, is not subject to execution.[55] So, where the vendor and vendee agree upon a sale and purchase of land, and that, simultaneously with the execution of the conveyance, a mortgage shall be executed for the purchase price or some part thereof, the two instruments, when so executed, are re-

480; Smith v. McCann, 24 How. 398; Hancock v. Titus, 39 Miss. 224; English v. Law, 27 Kan. 242; Morrison v. Harrington, 120 Mo. 665; Wright v. Franklin Bank, 59 Oh. St. 80.

[53] Drysdale's Appeal, 15 Pa. St. 457.

[54] Thomas v. Kennedy, 24 Iowa, 398; Lounsbury v. Purdy, 11 Barb. 490.

[55] Chickering v. Lovejoy, 13 Mass. 51; Haynes v. Jones, 5 Met. 292; Webster v. Campbell, 1 Allen, 313; Harrison v. Andrews, 18 Kan. 535.

Digitized by Google

garded as one, and there is no intervening period between the conveyance and the mortgage in which an execution lien or levy can attach and obtain precedence over the mortgage.[56]

§ 174. Lands in Adverse Possession.—It was for some time held, in Kentucky, that a sale under execution, of lands held adversely to the defendant, was void; or, in other words, that an involuntary, like a voluntary, transfer of real estate could not be made while the owner was disseised.[57] A different rule soon afterward obtained in that state.[58] So far as we have been able to ascertain, lands may, in every part of the United States, be taken in execution, notwithstanding a holding thereof adversely to the defendant, if he still retains a right of entry.[59] This seems to be contrary to the rule established under the English statutes in regard to extending lands under an elegit.[60] A claim of title without merit and without possession is not subject to execution. A sale against such claimant transfers no interest and creates no estoppel. If he should chance afterward to take possession, he cannot be ejected under the sheriff's deed.[61]

[56] Scott v. Warren, 21 Ga. 408; Ransom v. Sargent, 22 Kan. 517.

[57] McConnell v. Brown, 5 T. B. Mon. 479; Shephard v. McIntire, 4 J. J. Marsh. 111; Griffith v. Huston, 7 J. J. Marsh. 385.

[58] Frizzle v. Veach, 1 Dana, 211; Blanchard v. Taylor, 7 B. Mon. 649.

[59] Jarrett v. Tomlinson, 3 Watts & S. 114; Woodman v. Bodfish, 25 Me. 317; Jackson v. Varick, 7 Cow. 238; Kelly v. Morgan, 3 Yerg. 441; Nickles v. Haskins, 15 Ala. 619, 50 Am. Dec. 154; McGill v. Doe, 9 Ind. 306; High v. Nelms, 14 Ala. 350; State v. Judge, 48 La. Ann. 667.

[60] Watson on Sheriffs, 208.

[61] Hagaman v. Jackson, 1 Wend. 502.

Digitized by Google

§ 175. Possession without Title.—The mere possession, without title, is, no doubt, one of the least valuable interests or estates which can be held in lands. It is, nevertheless, a legal estate recognized and protected at law as against all persons save the true owner of the right to possession. It is prima facie evidence of title. It is subject to execution; and its sale, under process against the possessor, gives the purchaser all the rights accruing from the possession of the defendant,[62] together with the right to enter and enjoy the possession to the same extent as it could have been lawfully enjoyed by the defendant in execution if no sale had been made.[63] From this proposition there is some dissent. Thus, in Tennessee, a mere right of occupancy is not subject to execution.[64] So in Alabama,

[62] The purchaser at execution sale may take the same benefit from the statute of limitations that the defendant in execution could have taken. Scheetz v. Fitzwater, 5 Pa. St. 126; Overfield v. Christie, 7 Serg. & R. 173.

[63] Emerson v. Sansome, 41 Cal. 552; Thomas v. Bowman, 29 Ill. 426, 30 Ill. 94; Murray v. Emmons, 19 N. H. 483; Kellogg v. Kellogg, 6 Barb. 116; Jackson v. Town, 4 Cow. 599, 15 Am. Dec. 405; Talbot v. Chamberlin, 8 Paige, 219; Jackson v. Phillips, 9 Cow. 93; Dickinson v. Smith, 25 Barb. 102; Gray v. Tappan, Wright, 117; Miner v. Wallace, 10 Ohio, 403; Turney v. Saunders, 4 Scam. 527; French v. Carr, 2 Gilm. 664; Scott v. Douglass, 7 Ohio, 228; Dean v. Pyncheon, 3 Chand. 9; Bunker v. Rand, 19 Wis. 253, 88 Am. Dec. 684; Swift v. Agnes, 33 Wis. 228; Weare v. Johnson, 20 Colo. 363; Rosenfeld v. Chada, 12 Neb. 25.

[64] Daugherty v. Marcum, 3 Head, 323; Crutsinger v. Catron, 10 Humph. 24. It is difficult to reconcile these cases with the subsequent decisions in the same state affirming that the interest of a person in the adverse possession of real property is subject to his voluntary transfer, and that his possession and that of his vendee may, united, ripen into a prescriptive title. Marr v. Gilliam, 1 Coldw. 488; Hoge v. Hollister, 2 Tenn. Ch. 606.

Digitized by Google

Missouri, and Tennessee, an occupant of public lands has no interest which can be sold under execution.[65] The majority of the decisions in regard to occupants of public lands is the other way. Mere possessory interests in public lands may, in most of the states, be sold under execution, except where their sale would interfere with the laws of the United States in regard to the disposal of those lands. Hence, the owner of a mining claim on public lands in California has an interest liable to sale under a writ against him.[66] While mere possession without title is generally subject to execution, it must be remembered that possession may be held by virtue of some title which is not subject to execution. In such case, the exemption of the title usually carries with it the exemption of the possession.

§ 176. Interests in Government Lands.—Improvements situate upon the public lands are generally deemed subject to execution.[67] The erection of improvements is one of the acts necessary to show the good faith of one who is attempting to acquire title under the homestead and pre-emption laws; and their continuance on the property is not only conducive to his comfort, but practically indispensable to his resi-

[65] Rhea v. Hughes, 1 Ala. 219, 34 Am. Dec. 772; Hatfield v. Wallace, 7 Mo. 112; Brown v. Massey, 3 Humph. 470. But in Alabama possession is prima facie subject to execution. McCaskle v. Amarine, 12 Ala. 17.

[66] McKeon v. Bisbee, 9 Cal. 137; State v. Moore, 12 Cal. 56; Hughes v. Devlin, 23 Cal. 501.

[67] Switzer v. Skiles, 3 Gilm. 529, 44 Am. Dec. 723. Such improvements are exempted by statute in Arkansas. Healy v. Conner, 40 Ark. 352.

Digitized by Google

dence upon the property for the length of time requisite to his substantial compliance with these laws. The right to seize, sell, and remove his improvements must impede, and perhaps finally prevent, his compliance with the law. Where such result is likely to follow, we doubt the propriety of the decisions holding such improvements subject to execution. We have said, in the preceding section, that a possessory interest in public lands is generally subject to execution sale, unless such sale would interfere with the laws for the disposal of such lands. If the possessor has acquired a right of pre-emption, the policy of these laws will not permit of its transfer by sale under execution.[68] Where lands have been purchased of the United States, and payment therefor made, it is well settled that the purchaser acquires thereby an inchoate legal title. The patent, when issued, takes effect, by relation, as of the day when the payment was made. The interest of the purchaser may be levied upon and sold before the patent issues.[69] The same is

[68] McMillen v. Leonard, 19 Colo. 98; Brown v. Massey, 3 Humph. 470; Scott v. Price, 2 Head, 538; Bray v. Ragsdale, 53 Mo. 170; Moore v. Besse, 43 Cal. 511; Cravens v. Moore, 61 Mo. 178. Lester v. White, 44 Ill. 464, appears to intimate a contrary opinion, and refers to Turney v. Saunders, 4 Scam. 527, and French v. Carr, 2 Gilm. 664. These last two cases, however, affirm no more than that the interest and improvements of an occupant on public lands are subject to execution, provided that title derived from the government is not affected.

[69] Carroll v. Safford, 3 How. 441; Levi v. Thompson, 4 How. 17; Goodlet v. Smithson, 5 Port. 245, 30 Am. Dec. 561; Land v. Hopkins, 7 Ala. 115; Levi v. Thompson, Morris, 235; Cavender v. Smith, 5 Iowa, 157; Jackson v. Spink, 59 Ill. 404; Thomas v. Marshall, Hardin, 22; Martin v. Nash, 31 Miss. 324; Hamblen v. Hamblen, 33

Digitized by Google

true of the interest of the owner of a Spanish grant, after its presentation to the commissioners. The patent, when issued, relates back to the presentation of the petition for confirmation.[70] We think this general rule must prevail in every instance in which the defendant in execution has acquired an interest in the property which the law does not forbid him to voluntarily transfer. The conveyance made by an officer acting under execution is equivalent to the quitclaim deed of the defendant, and when that can convey an interest in the land, the sheriff's deed must be equally efficient.[71] But in Georgia, a grant from the state which did not become perfect until certain fees were paid was held not to be subject to execution.[72] A like decision was made in Indiana, in reference to school lands purchased from the state, and which the state had agreed to convey on payment of the residue of the purchase price. These decisions seem to us to be without any support in reason. Of course, it must be within the power of a state, in providing for the sale of its lands, to restrict the right of the purchaser, before acquiring a complete title, to alienate his interests, whether by a voluntary or involuntary transfer, and this restriction may be implied as well as expressed. The mere fact that he is under obligation to pay the residue of the purchase price, or to comply with some other condition, pecuniary or otherwise, does not seem

Miss. 453, 69 Am. Dec. 358; Lindsey v. Henderson, 27 Miss. 502; Jackson v. Williams, 10 Ohio, 69; Heffly v. Hall, 5 Humph. 581; Lee v. Crossna, 6 Humph. 281.

[70] Landes v. Perkins, 12 Mo. 254; Landes v. Brant, 10 How. 348; Stark v. Barrett, 15 Cal. 361; Walbridge v. Ellsworth, 44 Cal. 354.

[71] Kingman v. Holthaus, 59 Fed. Rep. 305.

[72] Garlick v. Robinson, 12 Ga. 240.

Digitized by Google

to us to imply that his estate or interest shall not be deemed subject to execution, if, by the laws of the state, equitable interests in real property are so subject.[73]

Section 2296 of the Revised Statutes of the United States declares that no lands acquired under the provisions of the chapter relating to homesteads shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of a patent therefor. Under this section it has been admitted, as to debts contracted before the final proof was made and the claimant became entitled to a patent, that the homestead could not be taken under any execution issued on a judgment therefor.[74] After such proofs have been made, and the claimant has nothing further to do except to wait for, and to receive, his patent, it has been insisted that, as he is entitled to a patent, and it, when issued, relates to, and becomes operative, as of a prior date when his right thereto became vested and perfect, the lands were subject to execution for debts contracted after such time, though before the actual issuing of the patent.[75] This construction of the statute does not give the words employed therein their natural signification. The question has not, so far as we are aware, been decided by the national courts, but a majority of the state courts to which it has been presented have held that lands acquired under the homestead laws of the United States are not subject to execution for any debt contracted prior to the actual issuing of

[73] Wilson v. Deweese, 114 N. C. 653; McWilliams v. Withington, 7 Fed. Rep. 326.

[74] Post, § 250; Shorman v. Eakin, 47 Ark. 351; Baldwin v. Boyd, 18 Neb. 444.

[75] Struby-Estabrook M. Co. v. Davis, 18 Colo. 93, 36 Am. St. Rep. 266.

Digitized by Google

the patent, irrespective of the time when the claimant became entitled thereto.[76]

§ 177. **Copyhold Estates,[77] and all Other Tenancies at Will** or by sufferance, are not subject to execution.[78] The reason of this rule is apparent. An occupant by the permission and at the will of the owner has no estate which he can transfer by a voluntary conveyance, and no possession which can be regarded as independent of or adverse to that of the owner. Hence, he has no interest in the title, nor in the possession, susceptible of transfer by execution.

§ 178. **Remainders and Reversions.**—A vested remainder is clearly and indisputably subject to execution at law against the remainderman.[79] The same is true of an interest in reversion after an estate for life or for years.[80] A reversioner or remainderman, though not entitled to the present possession of the lands, is nevertheless, regarded as the owner of an estate in possession. The possession of the tenant entitled to

[76] Bernard v. Boller, 105 Cal. 214; Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836; Wallowa N. B. v. Riley, 29 Or. 289, 54 Am. St. Rep. 794; Dean v. Dee, 5 Wash. 580.

[77] Watson on Sheriffs, 208.

[78] Wildy v. Bonney, 26 Miss. 35; Waggoner v. Speck, 3 Ohio, 292; Colvin v. Baker, 2 Barb. 206; Bigelow v. Finch, 11 Barb. 498, 17 Barb. 394.

[79] Wiley v. Bridgman, 1 Head, 68; Humphreys v. Humphreys, 1 Yeates, 427; Harrison v. Maxwell, 2 Nott & McC. 347, 10 Am. Dec. 611; Doe v. Hazen, 3 Allen, N. B., 87; Lockwood v. Nye, 2 Swan, 515, 58 Am. Dec. 73; Atkins v. Beans, 14 Mass. 404; Den v. Hillman, 2 Halst. 180; Williams v. Avery, 14 Mass. 20; Kelly v. Morgan, 3 Yerg. 347; Brown v. Gale, 5 N. H. 416; Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; White v. McPheeters, 75 Mo. 286.

[80] Wilkinson v. Chew, 54 Ga. 602; Atwater v. Manchester S. B., 45 Minn. 341; Murrell v. Roberts, 11 Ired. 424; Penniman v. Hollis, 13 Mass. 429; Burton v. Smith, 13 Pet. 464; Watson on Sheriffs, 208; Bishop of Bristol's Case, 2 Leon. 113.

Digitized by Google

present possession is regarded as the possession of the reversioner or remainderman. Hence, an estate in remainder or reversion may be transferred by voluntary conveyance, or by extent under elegit, or by sale under execution. If lands be devised to A for life, "and at her death to be equally divided between her children," each of her children takes a vested remainder in the land, which, during the life of the mother, is subject to execution, because the words of the devise show an intent that each of the children shall enjoy a several interest.[81] But, if the devise had been made to a fluctuating class of persons, so that it would have been uncertain whether the judgment debtor would be a member of the class at the termination of the life estate, the question would be more difficult and doubtful.[82] "A contingent remainder, conditional limitation, or executory devise, where the person is certain, is transmissible by descent. But such interests are not assignable at law, for the reason that in every conveyance there must be a grantor, a grantee, and a thing granted—that is, an estate, and such contingent interests do not amount to an estate, but are mere 'possibilities coupled with an interest.' It is held in the old cases that such contingent interests cannot be devised, as a devise is a species of conveyance, but by the latter cases they have been held to be devisable upon a wording of the statute of devises, a devise being in effect a mere substitution of some person to take in place of the heir. Such contingent interests not being assignable at law, it follows, as a matter of course,

[81] Davis v. Goforth, 1 Lea, 31.

[82] Watson v. Dodd, 68 N. C. 530; Penn v. Spencer, 17 Gratt. 85, 91 Am. Dec. 375; Payn v. Beal, 4 Denio, 405; Jackson v. Middleton, 52 Barb. 9.

Digitized by Google

that they cannot be sold under execution." [83] A testator devised lands to his widow for her own use during her natural life, and, at her death, to be equally divided among his surviving children. It was held that the interest vested in each of his children was a contingent remainder, that it was not until the death of the mother that it could be known which of the children, if any, would become entitled to share in the estate, and hence, that, prior to such death, the interest of each was not subject to levy and sale under execution.[84] A like conclusion was reached in Virginia in a similar case, though the statute of the state purported to authorize the attachment of any estate or debt of the defendant in execution.[85] While, if a voluntary assignment of an interest of this character were made, there being no fraud or imposition, a court of equity would, if the estate afterward vested in the assignor, compel him to make title, or else hold the estate as security for the consideration paid, [86] such court will not, in a creditors' suit, compel a transfer of such interest. "It is clear that such a possibility would sell for little or nothing, as no one would buy except the holder of the first estate, for the purpose of extinguishing the limitation. The party may, if he choose, enter into such an executory agreement to convey, provided the estate vests, and there is no principle upon which a court of equity can compel him to make an agreement." [87]

[83] Scott v. Scholey, 8 East, 467.

[84] Roundtree v. Roundtree, 26 S. C. 450; Hayward v. Peavy, 128 Ill. 431, 15 Am. St. Rep. 120; Thomson v. Ludington, 104 Mass. 193.

[85] Young v. Young, 89 Va. 675.

[86] Note to McCall v. Hampton, 98 Ky. 166, 56 Am. St. Rep. 339-361.

[87] Watson v. Dodd, 68 N. C. 528.

Digitized by Google

Under the statute of Missouri declaring that the term "real estate" "shall include all estates and interests in land, and that all real estate whereof a defendant shall be seised, either in law or equity, shall be subject to seizure and sale under execution," contingent as well as vested remainders are subject to execution.[88] So, in New York, it seems to be now settled that contingent future interests are subject to execution.[89]

§ 179. Franchises.—A "franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a fieri facias."[90] Thus, where a turnpike was levied upon and sold, the court, in determining that the levy ought to be set aside, said: "It has been decided that every kind of interest in land, legal or equitable, is subject to execution in this state. But it does not appear that the turnpike company had any estate of any kind in the land over which the road runs. They were permitted to enter upon the land and make a road under certain regulations, and, when the road was finished and approved by the governor, to take certain tolls. But there is nothing in the incorporating act which authorizes the com-

[88] White v. McPheeters, 75 Mo. 292.

[89] Sheridan v. House, 4 Keyes, 569; Moore v. Littel, 41 N. Y. 66; 40 Barb. 488; Woodgate v. Fleet, 44 N. Y. 1. Those who may chance to compare the above section with section 354 of the first edition of my work on judgments will see that I have abandoned the views there expressed.

[90] Gue v. Tide Water Canal Co., 24 How. 263; Stewart v. Jones, 40 Mo. 140; Munroe v. Thomas, 5 Cal. 470; Winchester and Lexington Turnpike Co. v. Vimont, 5 B. Mon. 1; Arthur v. C. & R. Bank, 9 Smedes & M. 431, 48 Am. Dec. 719; Thomas v. Armstrong, 7 Cal. 286; Ludlow v. Hurd, 6 Am. Law. Reg. 493; Hatcher v. T. W. & W. R. R. Co., 62 Ill. 477; Ammant v. The President etc., 13 Serg. & R. 210, 15 Am. Dec. 593; Seymour v. Mil. & Chil. Turnpike Co., 10 Ohio, 476; Western Pennsylvania R. R. v. Johnston, 59 Pa. St. 294; Mausel v. New York etc. R. R. Co., 171 Pa. St. 606.

Digitized by Google

pany to transfer their right to other persons; and such transfer would certainly be inconsistent with the whole design and object of the law. The defendants had no tangible interest—nothing which could be delivered by the sheriff to a purchaser under the execution. There was no rent or profit of any kind issuing out of land—nothing but a right to receive toll for horses, carriages, etc., passing over the land."[91] A grant was made to a railroad company, their successors and assigns, of the right of way over the lands of the grantor, "for the purpose of running, erecting, and establishing thereon a railroad, with the requisite number of tracks." The company entered upon the construction of its road, but, becoming financially embarrassed, finally ceased all attempts to complete the necessary work. Judgment was recovered by some of the contractors, under which executions were issued and levied upon "the right of way to the railroad, so far as the right of way has been obtained, and all appurtenances belonging to said railroad company." Subsequently a sale was made by the sheriff, of the property so levied upon, and in due time a deed therefor issued. The validity and effect of this sale and conveyance being subsequently questioned, the supreme court of the United States adjudged them to be void, because "no fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law or separate from the franchise to make and own and run a railroad," and because what the corporation "acquired was merely an easement in the land to enable it to discharge its function of mak-

[91] Ammant v. The President etc., 13 Serg. & R. 212, 15 Am. Dec. 593; Leedom v. Plymouth R. W. Co., 5 Watts & S. 265; Wood v. Truckee Turnpike Co., 24 Cal. 474; Ludlow v. Hurd, 6 Am. Law Reg. 493.

Digitized by Google

ing and maintaining a public highway, the fee of the soil remaining in the grantor." [92]

While franchises have been held not to be subject to execution, for the avowed reason that they are intangible, and cannot be delivered by the sheriff to the purchaser, it seems to be doubtful whether this is the true —or at all events, whether it is the only—ground upon which such exemption rests. If this were the only ground the franchise could not operate for the protection of tangible property capable of delivery by the officer. In truth, we think the chief, if not the sole, ground for the exemption of franchises from execution is, that they are in theory grants of special privileges from the sovereign power to persons, natural or artificial, and are, in the absence of permission from that power, not assignable by them, and hence, not subject to transfer under process against them.[93] It is, therefore, we think, substantially free from controversy that a franchise cannot be subjected to execution unless the statutes of the state, by whose authority the franchise was granted, have provided that it shall be so subject, and pointed out the means by which the creditor may proceed under his execution. Statutes of this character have been enacted in some of the states. Thus, in Massachusetts, "when a judgment is recovered against a corporation authorized to receive toll, its franchise, with all the rights and privileges thereof, so far as they relate to receiving toll, and also

[92] East Ala. Ry. Co. v. Doe, 114 U. S. 350; McColgan v. Baltimore R. R. Co., 85 Md. 519.

[93] New Orleans etc. R. R. Co. v. Delamore, 34 La. Ann. 1225; Brunswick G. L. Co. v. United G. F. & L. Co., 85 Me. 532, 35 Am. St. Rep. 385, and note, 396-407; Randolph v. Larned, 27 N. J. Eq. 557; Bayard's Appeal, 72 Pa. St. 453; Palestine v. Barnes, 50 Tex. 538.

Digitized by Google

all other corporate property, real and personal, may be taken on execution or warrant of distress, and sold by public auction."[94] This statute is applicable to railway corporations.[95] In 1870, the legislature of Pennsylvania also provided for the levy and sale on execution of the real, personal, and mixed property, franchises, and rights of corporations.[96] The statutes of Indiana enact that, upon execution issued upon any judgment or decree against a gravel road company, property may be taken and sold without any valuation or appraisement, and that any gravel road company may sell any part or section of its road to any other person or corporation, at such price and upon such terms as may be agreed upon between the parties. The courts of that state have held that whatever a corporation is given power to voluntarily alienate, its creditors may subject to sale by adverse process, and, therefore, that under these statutes a gravel road company might be sold either voluntarily or upon execution, and that its sale must necessarily carry with it the franchise and right to operate it.[97] Article 10 of section 4 of the constitution of Texas declares that "the rolling stock and all other movable property belonging to a railroad company or corporation in this state shall be considered personal property, and its real and personal property, or any part thereof, shall be liable to execution and sale in the same manner as the property of individuals." Under this statute the depot grounds of a railway company may be sold under execution, if it does not appear that they were acquired by condemnation proceedings in the exercise of the

[94] § 31, chapter 105, Public Statutes of Massachusetts.
[95] Simmons v. Worthington, 170 Mass. 203.
[96] Greensburg etc. Co. v. Irwin etc. Co., 162 Pa. St. 78.
[97] State v. Hare, 121 Ind. 308.

Digitized by Google

right of eminent domain.[98] It is not our object, however, in this work, to consider these or similar statutes, nor, strictly speaking, to treat of the subjecting of franchises to execution, for, by the rules of the common law, it was clear that they were not so subject.

A question of great difficulty and importance, and the only one deserving attention here is, to what extent, if at all, is real property withdrawn from execution because, by its ownership and use, it is connected with a public franchise, and its sale under execution may limit or impair the value of such franchise, or, what is more important in the eyes of the law, may prevent, or at least impede, the holder of the franchise from discharging the obligations to the public which have been expressly or impliedly imposed upon him. There are many cases affirming in general terms that the exemption of a franchise from execution extends to all property essentially necessary to its enjoyment, whether tangible or intangible.[99] This position is sustainable only upon the theory that the franchise is granted for the furtherance of certain objects which the granting power considers so important that it will neither tolerate private interference with the franchise, nor with other property, without which the objects sought could not be accomplished. This theory, though ultimately supplemented by express statutory

[98] Texas M. Ry. Co. v. Wright, 88 Tex. 346.

[99] The Susquehanna Canal Company v. Bonham, 9 Watts & S. 28, 42 Am. Dec. 315, in which case the house occupied by the collector of tolls on a canal was held to be not subject to sale under fieri facias. Gue v. Tide Water Canal Co., 24 How. 263, in which the sale of a house and lot, a wharf, and sundry canal locks was enjoined. Plymouth R. R. Co. v. Colwell, 39 Pa. St. 337, 80 Am. Dec. 526; Youngman v. R. R. Co., 65 Pa. St. 278; but by act of April 7, 1870, the franchises and property of corporations may be sold on execution; Philadelphia & B. C. R. R. Co.'s Appeal, 70 Pa. St. 355.

Digitized by Google

enactments, was very boldly declared in Pennsylvania, in the following language: "As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale; and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation, in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration. And that remedy is consistent with corporate existence, whilst a power to alien, or ability to levy and sale under execution, would hang the existence of the corporation on the caprices of the managers or on the mercy of its creditors. For the corporation would cease to exist for the purposes of its institution when its means of subsistence were gone. It might still have a name to live, but it could only be a life in name. A railroad company could scarcely accomplish the end of its being after the ground on which its rails rest had been sold to a stranger." [100] Carry this opinion to its logical conclu-

[100] Plymouth R. R. Co. v. Colwell, 39 Pa. St. 337, 80 Am. Dec. 528.

Digitized by Google

sion, and all property held by a corporation and necessary to enable it to discharge its duties to the public, or to effectuate the objects of its incorporation, must be adjudged not subject to execution. A railroad company can no more discharge its public duties without locomotives and passenger and freight cars than it can without a franchise, a track, or a depot; and yet, the existence of these great corporations, with all the property, real and personal, essential, or at least highly beneficial, to their successful operation, entirely exempt from execution at law, would be insufferable. So comprehensive an exemption will not now be sustained. So far as any general rule can be formulated upon the subject, it is this: that property of a corporation is not subject to execution which is not subject to voluntary transfer by the corporation. The mere right or franchise to be a corporation is never, in the absence of special statutory authority, subject to sale, whether voluntary or under execution.[101] So the franchise to build a railroad is so inseparably connected with the purposes of a railway corporation as also to be exempt from execution.

With respect to the property of a railway, or other corporation employed by it in its business, a distinction has been made between the road and structures immediately connected therewith and appliances afterward obtained for the purpose of operating the road. The interest or right of way in the land required for the construction of the road, the timber and iron of

[101] Commonwealth v. Smith, 10 Allen, 448, 87 Am. Dec. 672; Hall v. Sullivan R. R., 21 Law Rep. 138; Pierce v. Emery, 32 N. H. 484; 2 Redf. Ry. Cas. 631; Richards v. Merrimack Co., 44 N. H. 127; Kennebec R. R. v. Portland R. R., 59 Me. 9; Clarke v. Omaha R. R., 4 Neb. 458, 19 Am. Ry. Rep. 423; State v. Consolidated Coal Co., 46 Md. 1.

Digitized by Google

the track, and the depots, and structures for the supply of water, and the like, are said to be a part of the realty; and "the road is not regarded as so constructed and prepared for use until such things are affixed. But when the road is thus constructed and ready for use, other things are requisite for that use—locomotives, cars, and other articles and materials, some of which are consumed in the use, and the supply has to be from time to time renewed. Now, we think there is a manifest distinction between the road, as constructed for use, and the various things employed in that use, and the latter cannot with propriety be regarded as constituting a part of the real estate, but are the personal property of the corporation. We have no hesitation in coming to the conclusion that what we have described as the personal property of the corporation, employed in the use of its road and franchise, is liable for the payment of its debts. We think the line can be clearly drawn between the interest in real estate, and the franchise connected therewith, and the movable things connected with the franchise. The distinction appears to us to be as plain as that between a farm and the implements and stock which the proper use of the farm necessarily requires. There are instances which may be put still more analogous. Take, for example, a ferry franchise. It is connected with real estate; it is itself an incorporeal hereditament, and therefore real estate. The use of this franchise requires boats and other movable appliances. But these, when employed in the use of the ferry franchise, do not thereby become a part of the real estate; they are the personal property of the owner of the ferry franchise, or, it may be, of some person to whom the ferry franchise.

Digitized by Google

has been demised for a term of years." [102] These views respecting the separability of the personal property of a corporation from its franchises have met with general acquiescence. Such personal property will not be regarded as a part of the real estate or franchise of the corporation so as to withdraw it from execution, though its use, or the use of other property of like character, is required for the successful operation of the road.[103] It was said, however, in Northern P. R. R. Co. v. Shimmel, 6 Mont. 161, that "if an office safe at a depot, in which the agent deposits and keeps his daily receipts and valuable papers, is useful and facilitates the successful operation of the road, it could no more be seized under execution than could a section of the rails, or roadbed, or a water tank. These things are incident to the franchise, and cannot be disturbed. They are the means by which the franchise is exercised. They are the necessary instruments of its use."

In the case of corporations of a private character whose only franchise is that of the express or implied grant to them of the right to exercise their corporate powers, they cannot successfully claim that such franchise withdraws their real property from execution. Where, on the other hand, a corporation exercises a franchise for the benefit of the public, and is thereby charged with certain public duties and responsibilities, there is no dissent from the general proposition that, in the absence of legislative authority, express or implied, for subjecting their franchises to execution, none

[102] Coe v. Columbus, P. & I. R. R., 10 Ohio St. 372, 75 Am. Dec. 522.

[103] Pierce v. Emery, 32 N. H. 484; Sangamon & M. Ry. Co. v. Morgan County, 14 Ill. 163, 56 Am. Dec. 497; Boston, C. & M. R. R. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336; Risdon I. & L. W. v. Citizens, 122 Cal. 94, 68 Am. St. Rep. 25.

Digitized by Google

of their real property is subject to this writ, if it is essential to the enjoyment of their franchises, and the being deprived of it may disable the corporation from performing its duties to the public.[104] Of course, there may be difficulty in determining in some cases whether the particular real property in question is so indissolubly connected with the franchise that the taking of the former may impair the latter, and upon this subject different courts may, upon precisely the same state of facts, reach adverse conclusions. There is, however, no doubt of the general principle itself. If a corporation is authorized to construct and maintain a railroad or a turnpike, there can be no doubt that the lands over which the railroad or turnpike has been constructed are indispensable to the exercise of its franchise, and that this rule must also apply to bridges and like structures without which the railway could not be operated or the turnpike used by the general public.[105] So, if a corporation is authorized to construct and maintain water works and their appliances for the purpose of furnishing water to a city, or to any other densely populated portion of the country, no part of its lands necessary to its operations is subject to execution.[106] If lands have been acquired by a corporation in the exercise of the right of eminent domain, because necessary for a public use in behalf of which the corporation was authorized to exercise such right, they cannot be sold under execution against such corporation.[107] We as-

[104] Gardner v. Mobile & N. R. R. Co., 102 Ala. 635, 645, 48 Am. St. Rep. 84; East Side Bank v. Columbus etc. Co., 170 Pa. St. 1.

[105] Louisville etc. Co. v. Boney, 117 Ind. 501; Overton B. Co. v. Means, 33 Neb. 857, 29 Am. St. Rep. 514; Youngman v. Elmira & W. R. R. Co., 65 Pa. St. 278; Baxter v. Nashville & H. T. Co., 10 Lea, 488.

[106] Louisville W. Co. v. Hamilton, 81 Ky. 517.

[107] Gooch v. McGee, 83 N. C. 59, 35 Am. Rep. 558; Coe v. Columbus etc. R. R. Co., 10 Ohio, 372, 75 Am. Dec. 522.

Digitized by Google

sume that the mode of the acquisition of such lands cannot be material, or, in other words, if the circumstances are such that they might have been acquired in the exercise of the right of eminent domain, they are not subject to execution, though their owner, instead of requiring adverse proceedings to deprive him of his possession, voluntarily transferred them to the corporation for whose use they were and are required. If corporate franchises can only be exercised on a designated lot, "then the lot is an incident of the corporation, and can no more be sold under execution than could the corporation itself." [108]

In Maryland it is said that real property may be withdrawn from execution by its connection with a franchise, although not absolutely indispensable to its exercise. Thus, where certain property connected with a canal was levied upon, and the question arose whether it was subject to execution, the court said: "From the nature of the property, its location, and connection with the canal, and the use heretofore made of it, I cannot hesitate to conclude that the property levied on is needed and essential to the operation of the canal. It is not a question whether the property be absolutely necessary or indispensable to the operation of the work, but whether it has been used, or is of a nature to be of practical use, in operating the work. The wharf and parcel of land connected therewith, as described, would certainly appear to be of a nature to be essential to the operation of the canal, and, from the evidence in the case, I think all the property levied on is and will be of practical use in conducting the affairs pertaining to the canal and its operations. And that being so, it is clear, upon well-settled principles,

[108] Palestine v. Barnes, 50 Tex. 538.

Digitized by Google

that an execution will not lie, or will not be allowed to be executed, against such property." [109]

An execution based upon a decree of foreclosure stands upon a somewhat different footing from an ordinary execution at law. So far as the principles of public policy are concerned, there can be no difference. The results to the public would not be less disastrous in the one case than in the other. But great public improvements are rarely constructed without resort being made to the borrowing of money in some form; and this money is generally secured by mortgage or trust deed, either of which form of security would be greatly impaired in efficiency and value if disconnected from the right to sell the franchises of the corporation and all the property incidental thereto. The right to mortgage the franchises of the corporation is generally conferred by statute. Where this is so, there can be no question of the propriety of a decree ordering their sale, and no doubt that the sale, if regularly made, will transfer the title to all the property mortgaged. In some of the states, independently of statutory authority, a railway corporation is held to have power to mortgage its road, and to include in such mortgage the franchise or right to construct and maintain such road.[110]

We shall not here enter upon an examination of the question of the implied power of corporations of a quasi-public character to mortgage or create other liens upon their franchises and the property essential to their enjoyment. It is sufficient for our present purpose to

[109] Brady v. Johnson, 75 Md. 445.

[110] Bardstown & L. R. R. v. Metcalfe, 4 Met. (Ky.) 199, 81 Am. Dec. 541. The contrary doctrine is better supported by the authorities. Richardson v. Sibley, 11 Allen, 65, 87 Am. Dec. 700; Tippecanoe Co. v. Lafayette R. R. Co., 50 Ind. 97; Ehrman v. Insurance Co., 35 Ohio St. 341.

Digitized by Google

state that, whenever a lien is authorized to be created thereupon by law, it necessarily follows that there must be some remedy for the enforcement of such lien, and ordinarily it must be through the sale of such franchises and property, and, when such sale is authorized by the decree of a court of competent jurisdiction, the franchises and property described in such decree are thereby made subject to sale, and the sale thereof must be as effective in transferring the title of the defendants in execution as any other judicial sale.[111]

It cannot be within the contemplation of statutes authorizing the sale of a franchise that it shall be separated into distinct parts, or, as the result of a sale, that two or more persons shall be vested with the franchise, nor that the property necessary to its exercise shall be divided into distinct parcels, and that which was effective as a whole shall become ineffective, because separated into parts. Hence, it may frequently happen that real property may become subject to sale under the decree of a court of a state in which it is not situated. This is an almost inevitable result of permitting the mortgaging of the franchises and property of a railway, the line of which extends through two or more states. In foreclosing such a mortgage, it is within the power of the court to decree a sale of the entire property covered thereby and direct its master, who is ordered to make the sale, to execute a good and sufficient deed or deeds to the purchaser.[112]

In North Carolina the property of a corporation may

[111] Louisville etc. R. R. Co. v. Boney, 117 Ind. 501; Detroit v. Mutual G. Co., 43 Mich. 594; St. Paul etc. R. R. Co. v. Parcher, 14 Minn. 297; National F. etc. Works v. Oconto W. Co., 52 Fed. Rep. 43; New Orleans etc. Co. v. Delaware, 114 U. S. 501.

[112] McElrath v. Pittsburgh etc. Co., 55 Pa. St. 180; Miller v. Dows, 94 U. S. 444.

Digitized by Google

be seized and sold under execution, though by such sale the corporation will be deprived of the means of enjoying its franchise;[113] and the decisions in Mississippi and Missouri tend strongly toward the same conclusion.[114] But, conceding that the property of a corporation necessary to the exercise of its franchise is exempt from execution, this exemption cannot continue after the exercise of the franchise has been abandoned. Hence, if a railroad company has ceased to use a portion of its road for public purposes, and is proceeding to take up and carry away the rails, the portion so abandoned is subject to levy under execution.[115] In most of the states statutes have been enacted under which franchises and all property connected therewith may be made available in satisfaction of judgments recovered against their owners. We shall make no attempt here toward compiling these statutes, nor presenting the decisions which have been made thereunder, but shall turn the reader for further information to the statutory compilations of his own particular state. Before doing so, however, we stop to remark that the general principle seems to prevail—that, as these statutes are in derogation of the common law, their provisions must be strictly followed in order to impart validity to any attempted sale or sequestration.[116]

[113] State v. Rives, 5 Ired. 306.

[114] Arthur v. C. & M. Bank, 9 Smedes & M. 431, 48 Am. Dec. 719; Stewart v. Jones, 40 Mo. 140. See Railroad Co. v. James, 6 Wall. 750; Coe v. C. P. & I. R. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Covington Co. v. Shepherd, 21 How. 112.

[115] Benedict v. Heineberg, 43 Vt. 231; Gardner v. Mobile etc. R. Co., 102 Ala. 635, 48 Am. St. Rep. 84.

[116] James v. Plank Road Co., 8 Mich. 91; Ammant v. The President etc., 13 Serg. & R. 210, 15 Am. Dec. 593; Gregory v. Blanchard, 98 Cal. 311.

Digitized by Google

§ 180. The Effect of the Sale of Franchise and Property of a Corporation.—As the power to transfer a franchise under execution depends upon statutory provisions enacted in the state wherein the transfer is made, so the effect of the transfer is necessarily dependent upon the same provisions. In this country, franchises of any considerable importance are usually exercised by corporations. In many cases it seems difficult to separate the franchise from the corporate powers and privileges in connection with which it has been enjoyed. And yet it seems to be settled that the sale of the franchise and property of a corporation has no operation to destroy the corporate existence, nor to transfer the general powers or obligations of the corporation. The few decisions which have been made in regard to the effect of the compulsory sale of franchises, so far as we are aware, have arisen out of sales made under mortgages given by railroad corporations. A sale of the property and franchises of a corporation does not include the right to be a corporation, and hence does not destroy the corporate existence of the corporation, whose property and franchises are sold, nor does it confer any corporate capacity or rights upon the purchaser.[117] In Eldridge v. Smith,[118] Chief Justice Poland, determining the effect of such a sale, said: "When a railroad company mortgages its road and appurtenances as a security for debt, and also its franchise, it is not to be understood as conveying its corporate existence or its general corporate powers, but only the franchise necessary to make the convey-

[117] Joy v. Jackson etc. R. R. Co., 11 Mich. 155; Willsborough etc. R. Co. v. Griffin, 57 Pa. St. 417; Commonwealth v. Central P. Ry., 52 Pa. St. 506.

[118] 34 Vt. 490.

Digitized by Google

ance productive and beneficial to the grantees, to maintain and support, manage and operate, the railroad, and receive the tolls and profits thereof for their own benefit." In the case of Atkinson v. Marietta & Cincinnati Railroad Company, as reorganized,[119] the company sought to appropriate certain lands to its use for a railroad track. It was resisted on the ground, among others, that it had no such corporate existence, under the laws of the state, as authorized it to exercise the right of eminent domain. The company showed that the railroad corporation, as originally organized, had mortgaged its property and franchises; that a sale had been made under such mortgage, and also under the provisions of a special act of the legislature; that this act undertook to confer on the purchasers all the rights and powers embraced in the charter of the original corporation; and that the present company had reorganized under the provisions of this special act. On the other side, it was insisted that this act was repugnant to the constitution of the state, which prohibited the passage of "special acts conferring corporate powers." The counsel for the company, to avoid the force of this objection, contended that the act, instead of conferring corporate powers, simply declared "the effect of a sale of the road and franchises under the decree." In discussing this point, the court said: "To enable us to see clearly what the act has attempted to accomplish, and what it must have effectually accomplished, to invest the defendant with the capacities and powers of the old charter, it may be well to consider what would have been their position if this act had not been passed. They were mortgage creditors of the old company, having a decree for the sale of its road.

[119] 15 Ohio St. 21.

Digitized by Google

If, without this act, they had become the purchasers of the property, they would also have been invested with the franchise of maintaining, operating, and making profit from the use of the road, according to the grant made to that company. But neither their mortgage nor decree gave them any right to or lien upon the corporate existence of the Marietta & Cincinnati company; nor could any sale under the decree have divested the stockholders of that company of this franchise, or have invested the purchasers with a corporate existence. The capacity to have perpetual succession under a special name and in an artificial form, to take and grant property, contract obligations, and sue and be sued by its corporate name as an individual, were franchises belonging to the individual stockholders of that company, inalienable in the hands of the artificial being thus created, and without any power 'to transfer its own existence into another body; nor could it enable natural persons to act in its name, save as its agents, or as members of the corporation acting in conformity to the modes required or allowed by its charter.' Although it may be divested of its property, together with the franchise of operating and making profit from the use of the road, its corporate existence survives the wreck, and endures until the state sees fit to terminate it by a proper proceeding. It is hardly necessary to add that a delegation of the power of eminent domain to a corporation, as a means to carry into effect the grant of its franchises, cannot be made the subject of either grant or sale." [120] Where the purchasers, under a mortgage sale, of the property and franchises of a railroad corporation, are authorized,

[120] Atkinson v. M. & C. R. R. Co., 15 Ohio St. 35; Gulf etc. R. Co. v. Morris, 67 Tex. 692.

Digitized by Google

by statute, "to organize anew, and be invested with all the rights and powers of the old company in the management of the road and business," and they do so organize, the reorganized corporation is not liable for any of the debts of the old corporation.[121]

In many of the states statutes have been enacted authorizing the mortgaging of the franchises and property of corporations of a quasi-public character, and expressly providing that the purchasers at sales, under such mortgages, may organize themselves into a new corporation with the same rights and privileges as the corporation whose franchises and property have been sold. When the purchasers have organized themselves into a corporation, as the statute permits, they receive thereby from the state a grant of the same privileges and franchises which were possessed by the corporation against whom the foreclosure sale was made. The new corporation is subject to the same legislative control to which the old was subject.[122] As the new corporation takes by virtue of the implied regrant from the state, such corporation, with respect to its franchises and rights, is subject to all statutes enacted prior to this regrant, though subsequent to the grant to the original corporation.[123] In the absence of a statute expressly or impliedly permitting it, the purchasers are not authorized to form a new corporation. The transfer of the franchise of the corporation under

[121] Vilas v. M. & P. R. W. Co., 17 Wis. 497; Smith v. C. & N. W. R. R. Co., 18 Wis. 17; Stewart's Appeal, 72 Pa. St. 291; Pruffert v. Great W. R. R. Co., 25 Ill. 353; Hatcher v. Toledo etc. R. R. Co., 62 Ill. 477; Cook v. Detroit etc. Ry. Co., 43 Mich. 349; Memphis W. Co. v. Magens, 15 Lea, 37; Gulf etc. Ry. Co. v. Newell, 73 Tex. 324, 15 Am. St. Rep. 788.

[122] Richardson v. Sibley, 11 Allen, 65, 87 Am. Dec. 700.

[123] State v. Sherman, 22 Ohio St. 411; Trask v. Maguire, 18 Wall. 391; Railroad Co. v. Georgia, 98 U. S. 359.

Digitized by Google

execution, foreclosure, or other authorized sale, though provided for and sanctioned by statute, does not impair any right on the part of the purchasers to exercise the right of being a corporation, or to organize themselves into a corporation. These rights must be conferred in express terms, or by the grant of powers from which they are necessarily implied.[124] As the franchise of a corporation cannot be sold in parcels, a mortgage of separate divisions of a railway, and its subsequent foreclosure and sale, cannot authorize the organization of two or more corporations, each invested with the franchises and rights of the old corporation.[125]

§ 181. The Interest of a Vendor who has not yet conveyed the title to his vendee may be sought to be made available under a writ against him, either when he has given possession, and received full payment for the property, and has, therefore, no beneficial interest therein, or when, though under a binding contract to sell and convey, full payment has not been made, and he yet retains the legal title as security for the payment of his purchase-money. In either case, it is quite clear that, if the property is subject to execution at all, the title acquired by the purchaser at the execution sale, with notice of the prior contract of sale, must be subordinate thereto; and that the fact that the purchaser is in possession under a contract constitutes sufficient notice thereof;[126] but it may be insisted that as there remains a legal estate in the vendor, it passes by the execution sale, leaving the vendee to assert his

[124] Wellesborough etc. R. R. Co. v. Griffin, 57 Pa. St. 417; Central R. R. Co. v. Georgia, 92 U. S. 665.

[125] State v. Morgan, 28 La. Ann. 482; Muller v. Dows, 94 U. S. 444.

[126] Corey v. Smalley, 106 Mich. 257, 58 Am. St. Rep. 474.

Digitized by Google

rights by some equitable proceeding. The prevailing opinion, however, is, that where the vendor retains no beneficial interest, the property is not subject to execution against him, and a purchaser with notice, actual or constructive, does not even obtain the legal title, or, at least, that he may be defeated on his bringing an action at law, although the vendee interposes no equitable defense.[127] A like result follows where, though the purchase price has not been fully paid, the vendor, before the levy of the execution against him, has transferred the notes given him for the unpaid purchase money.[128] If the vendor has endorsed the notes, and remains liable thereon to his endorsee, there is a possibility that the latter may maintain an action against the vendor thereon, who may again become entitled to assert his legal title to the extent of compelling the vendee to discharge such notes, or, in other words, the vendor, notwithstanding his endorsement, may become entitled to the same remedies to which he was before it was made. These contingencies are too remote to justify the sustaining of an execution sale of the premises under a judgment against him made after his endorsement, and before any proceedings have been taken to hold him answerable thereon.[129] If the vendor has received partial payment, and retains the title as security for the balance, the case seems, on principle, to be essentially different. For, in that event, he has both the legal title and a beneficial interest therein. According to the better opinion, his interest may

[127] Cutting v. Pike, 21 N. H. 347; Paramore v. Persons, 57 Ga. 473; Black v. Long, 60 Mo. 181; Parks v. People's Bank, 97 Mo. 130, 10 Am. St. Rep. 295.

[128] Catlin v. Bennatt, 47 Tex. 165; Neal v. Murphy, 60 Ga. 388.

[129] Leitch v. May, 98 Ga. 714.

Digitized by Google

be taken in execution, subject to the rights of the vendee, under the contract of sale.[130]

It may be conceded that if the vendee is in possession, he may deal with his vendor as the owner of the property until actual notice to the contrary is given, or, at all events, that such vendee is not charged with constructive notice of judgments rendered, or writs levied, against his vendor, and is protected in all payments made to the vendor pursuant to the contract of purchase at any time prior to receiving notice of such judgments or levies.[131] We are, however, entirely unable to understand how the interest of a vendor, while he retains the legal title, and has the right to continue to retain it, because the contract of purchase has not been performed, can be held not subject to execution to the extent of transferring by an execution sale the precise interest held by the vendor. Nevertheless, the rule in Kentucky,[132] South Carolina,[133] Mississippi, and North Carolina is otherwise.[134] A contract for the sale of real estate, followed by a partial payment, has, in those states, the effect of entirely withdrawing the property from the reach of an execution at law, whether against the vendee or against the vendor. A judgment creditor of the vendor has only two modes open to him: "either to have sequestered the debt by

[130] Riley v. Million, 4 J. J. Marsh. 395; Patterson's Estate, 25 Pa. St. 71; Hardee v. McMichael, 68 Ga. 678; Bell v. McDuffie, 71 Ga. 264; Doak v. Runyan, 33 Mich. 75; Corey v. Smalley, 106 Mich. 257, 58 Am. St. Rep. 474; Olander v. Tighe, 43 Neb. 344; Courtnay v. Parker, 16 Neb. 311; Kinports v. Boynton, 120 Pa. St. 306, 6 Am. St. Rep. 706.

[131] Benbow v. Boyer, 89 Iowa, 494; Burke v. Johnson, 37 Kan. 337, 1 Am. St. Rep. 252; Moyer v. Hinman, 13 N. Y. 180.

[132] Cooper v. Arnett, 95 Ky. 603.

[133] Adicks v. Lowry, 15 S. C. 128.

[134] Money v. Dorsey, 7 Smedes & M. 15; Tally v. Reed, 72 N. C. 336; Folger v. Bowles, 72 N. C. 603.

Digitized by Google

summons in garnishment; or to have brought a bill in chancery, and asked that the equity of the vendor upon the land, as security for the debt due him, might be applied to the satisfaction of the judgment." [135] The only defense which may be made for these decisions is the assumption that, a mere contract of purchase, followed by possession taken thereunder, and a partial payment of the purchase price, operates to divest the vendor of all beneficial interest in the property, leaving him no estate capable of transfer, even by his voluntary act; and that, for the purpose of execution, his interest is the same as if he had made a conveyance of the legal title, and therein reserved a vendor's lien for the balance of the purchase price. To this extent has the supreme court of Missouri gone. Thus, speaking of a vendor who had retained the legal title, that court said, after he "had sold, by a written contract, his interest in the land to his brother, and received a part of the purchase money, and the vendee took and held the exclusive possession, which he had previously held in common with his vendor, he retained no real interest therein. By his contract he parted with all beneficial interest in the land, except the mere incidental right to a vendor's lien for the balance of the purchase price. He continued to hold the legal title, but only in trust for his vendee, who had the right to demand a conveyance thereof whenever the purchase money was paid. The simply legal title as trustee, without possession, did not constitute an interest in land which was subject to the lien of a judgment or execution." [136]

If a vendor has parted with the legal title, but re-

[135] Taylor v. Lowenstein, 50 Miss. 278; Chisholm v. Andrews, 57 Miss. 636.

[136] Jones v. Howard, 142 Mo. 117, 64 Am. St. Rep. 546.

Digitized by Google

tains a lien to secure the payment of the balance of the purchase price, he has no interest in the property which is subject to execution as real estate.[137]

If parties, in contemplation of the sale and purchase of real property, execute a conveyance thereof, and promissory notes for the purchase price are left, both the conveyance and the notes, in the hands of a third person, to be delivered when the vendor had produced an abstract of title, and the title, as therein disclosed, should be approved by the depositary, the interest of the vendor remains subject to execution until the contingency has happened under which a delivery of the deed was authorized; for, until that time, the vendor has not parted with any interest in the property, either legal or equitable.[138]

§ 182. The Interest of Defendant after a Sale under Execution.—The owner of real estate which has been sold or extended under execution has, in many of the United States, the right to redeem the same from such sale within the time and upon the terms prescribed by statute. He has, pending the time for the redemption, the possession of the property, and a beneficial as well as legal estate therein. His estate is subject to his voluntary disposition, and we perceive no reason why it ought not to be susceptible of levy and sale under execution against him. That it is so subject is now affirmed by a preponderance of the authorities,[139]

[137] Fallon v. Worthington, 13 Colo. 559, 16 Am. St. Rep. 231.

[138] Wolcott v. Johns, 7 Colo. App. 360.

[139] Curtis v. Millard, 14 Iowa, 128, 81 Am. Dec. 460; Herndon v. Pickard, 5 Lea, 702; Barnes v. Cavanagh, 53 Iowa, 27; Russell v. Fabyan, 34 N. H. 218; Nutt v. Cuming, 155 N. Y. 309; Bennett v. Wilson, 122 Cal. 509, 68 Am. St. Rep. 61.

Digitized by Google

but is denied in at least one state,[140] on the ground that to permit it to be sold under a second writ would frustrate the humane objects of the statute in giving the debtor a time in which he may rescue his property from the sacrifice likely to attend an absolute, involuntary sale. While the statute was doubtless designed to operate beneficially to the debtor, it was not intended to do so at the expense of his other creditors, and they are not to be deprived of an opportunity to satisfy their demands merely because the property has been sold subject to redemption, and probably for a sum representing but a small part of its value. Perhaps the chief value to the judgment debtor of his right to redeem is, that it coerces the judgment creditor into bidding a fair price for the property, lest it should be redeemed by the defendant or his assignee, and the creditor's purchase thereby defeated, without his judgment being satisfied or the full value of the land realized. This right would be very seriously imperiled, and the debtor needlessly vexed and exposed to ruinous costs, if the creditor could make successive levies and sales of the same land under the same judgment. The creditor might purchase the land at a wholly inadequate price, and then, under another execution issued for the same debt, levy on the same land, and greatly embarrass the debtor in his attempts to exercise his right of redemption. In the absence of any statutory provision on the subject, the courts whose attention has been directed to this question have therefore determined that a sale of land under a judgment

[140] Merry v. Bostwick, 13 Ill. 398, 54 Am. Dec. 434; Watson v. Reissig, 24 Ill. 281, 76 Am. Dec. 746; Bowman v. People, 82 Ill. 246, 25 Am. Rep. 316; Kell v. Worden, 110 Ill. 310; Hill v. Blackwelder, 113 Ill. 283.

Digitized by Google

withdraws it from any further levy and sale under the same judgment pending the time allowed for redemption, unless in the meantime the debtor should acquire some additional title.[141] In England, when an extent has been perfected under an elegit, the defendant retains no interest which can be extended under a subsequent elegit.[142]

If lands be sold for a sum not sufficient to satisfy the judgment, and thereafter redeemed by the defendant, they may be resold to pay the balance due on the same judgment.[143] Of this there is no doubt, so far as the interests of the defendant are concerned. He may, however, have sold the property, or created, or suffered, liens against it, and the redemption may have been made by his grantee or by a lienholder, and then the question is inevitably presented, does the lien of the original judgment or execution continue, so that the sale made to pay the balance due takes precedence over the title of the subsequent grantee or lienholder, or must the sale made in satisfaction of such balance relate only to the date of the levy under which it was made. The question is by no means free from doubt. Probably the weight of authority inclines to the view, in the absence of express statutory direction to the contrary, that a redemption, irrespective of the person by or in whose interest it is made, merely puts an end to the sale, except that the amount thereof must still be credited on the judgment under which it was made, but that, as to the balance of that judgment, the real property of the defendant is subject thereto to the same

141 Hardin v. White, 63 Iowa, 633; Peebles v. Pate, 90 N. C. 348.

142 Carter v. Hughes, 27 L. J. Ex. 225; 2 Hurl. & N. 714.

143 Wood v. Colvin, 5 Hill, 228; Titus v. Lewis, 3 Barb. 70; Campbell v. Maginnis, 70 Iowa, 589.

Digitized by Google

extent as if the amount realized from the former sale had been voluntarily paid. Where this rule prevails, the land is not only subject to sale for the portion of the judgment remaining unpaid, but the original judgment lien, as to such balance, is regarded as intact, and hence a sale may cut off the interests of grantees and incumbrancers whose titles or liens are of a date subsequent to the judgment.[144] The effect of a redemption is necessarily a matter of statutory regulation, and must, hence, in each state, be considered in the light of its statutes. Where, however, the right of redemption is given to junior incumbrancers, it is generally intended to enable them either to become assignees of the purchaser, or, at least, to hold the property subject to their lien after repaying the purchaser the amount of his bid, with such interest as the statute exacts. Therefore, the better opinion, we think, is, that if the person making the redemption is not liable personally for the amount remaining unpaid on the original judgment, his interest in the property cannot be exposed to the hazard of another sale thereunder.[145]

§ 183. Heirs and Devisees.—Upon the death of a person seised of lands, his estate passes, by operation of law, to his heirs or devisees. It is true that such estate is liable to administration, and may be made

[144] Allen v. McGaughley, 31 Ark. 252; State v. Sherill, 34 Ind. 57; Goddard v. Renner, 57 Ind. 530; Cawthorne v. Indianapolis etc. R. R. Co., 58 Ind. 14; Hervey v. Krost, 116 Ind. 268; Rutherford v. Newman, 8 Minn. 47, 82 Am. Dec. 122; Boyce v. Wright, 2 Abb. N. C. 163; Bodine v. Moore, 18 N. Y. 347; Flanders v. Aumack, 32 Or. 19, 67 Am. St. Rep. 504, and note.

[145] Simpson v. Castle, 52 Cal. 644; Black v. Gerichten, 58 Cal. 56; Ogle v. Koerner, 140 Ill. 170; Anderson v. Anderson, 129 Ind. 573, 28 Am. St. Rep. 211; Ahern v. Freeman, 46 Minn. 206, 24 Am. St. Rep. 206; Spraudel v. Houde, 54 Minn. 308.

Digitized by Google

answerable for the debts of the deceased, if his personal property should prove inadequate to their satisfaction. The title, however, passes to the heirs or devisees, subject to a lien in favor of the creditors. Each of the heirs has, therefore, a legal estate, subject to be alienated or devised by him, and also subject to execution against him, as other beneficial legal estates are. The purchaser, whether at a voluntary or a compulsory sale, acquires the estate of the heir, subject to the rights of the creditors.[146] In Georgia and Louisiana, it has been held that when the heirs are entitled to several parcels of land, a specific parcel cannot, before partition, be sold on execution against a single heir. The reason urged in support of this decision is, that such a sale is an attempt to interfere with the right of the other heirs to partition.[147] Later cases in Georgia show the inclination of the court to question, and, if necessary, to deny, the soundness of the earlier decisions. Referring to the case of Clarke v. Harker, just cited, and the reasons there given, Judge Bleckley, in delivering the opinion of the court

[146] Procter v. Newhall, 17 Mass. 81; Douglass v. Massie, 16 Ohio, 271; Black v. Steel, 1 Bail. 307; Vansyckle v. Richardson, 13 Ill. 171; Dearmond v. Courtney, 12 La. Ann. 251; Noble v. Nettles, 3 Rob. (La.) 153; Mayo v. Stroud, 12 Rob. (La.) 105. If judgment is entered against an heiress, in consequence of a warranty made by her ancestor, for a certain sum, "to the extent of her interest in the estate of her father," execution cannot be levied upon her property pending the settlement of the estate, for, prior to such settlement, it cannot be known what is the extent of her interest in the estate of her father. In other words, such judgment is indefinite and meaningless, and not until given precision by the final settlement of the estate is it the proper basis for an execution or levy. Morgan v. Lalanne, 32 La. Ann. 1300.

[147] Clarke v. Harker, 48 Ga. 596; Mayo v. Stroud, 12 Rob. (La.) 105. See Freeman on Cotenancy and Partition, §§ 199-208; also § 216, Butler v. Boys, 25 Mich. 53, 12 Am. Rep. 218.

Digitized by Google

in Wilkinson v. Chew, [148] remarked: "I doubt whether those reasons are not open to grave criticism. Distribution in kind is but partition; and if each distributee can sell privately as much or as little of his undivided interest as he chooses, it is difficult to see why it may not be levied upon and sold by the sheriff. The purchaser, in either case, would simply occupy the place, quoad hoc, of the distributee or tenant in common. Upon principle as well as authority, subjection to levy and sale should rest on two questions only: Is there a vested interest? and is it so definite as to be susceptible of description in terms of legal certainty? What equities may arise afterward between cotenants or codistributees may be left to the general resources of remedial jurisprudence." The contention, where the interest of an heir extends to several parcels of real property, in all of which his interest is undivided and not in severalty, that it cannot be sold under execution prior to the distribution, because thereby the rights of the heirs to partition might be prejudiced, is but a reassertion of the claim, often made and almost universally overruled, that a cotenant cannot convey a part of the real estate of the cotenancy by metes and bounds.[149] There is little doubt that such a conveyance, when voluntarily made, is good, at least against the cotenant making it, and will by the court be protected in subsequent proceedings for partition, if possible, without doing injustice to the other cotenants. Generally, a legal estate which is subject to voluntary alienation is equally subject to execution, and we see no reason for denying that an heir may, at any time after the death of his ancestor, convey his

[148] 54 Ga. 602; see, also, Du Bose v. Cleghorn, 65 Ga. 302.
[149] Freeman on Cotenancy and Partition, § 199.

Digitized by Google

moiety in the latter's real estate, and that his interest therein is hence subject to execution.[150]

An executory devise is, even while the first devisee in fee is still living, an existing interest, and not a bare possibility. "It is entirely certain that such an interest may be transferred by assignment, even at law, and, consequently, that it may be sold by execution.[151] The personal property of a decedent does not, like his real estate, vest immediately upon his death in his heir at law. It goes to the administrator or executor; and, whether the title vests in the executor or the heir, the possession of the property passes into the custody of the executor as an officer of the law, and, while it remains in the custody of the law, the property is not subject to execution against the heirs, nor can the amount bequeathed to a legatee be garnished." [152]

The operation of the will of a decedent may be such as to convert his real estate, or some part of it, into personalty, as, where he directs his executors to sell such real estate, and to divide the proceeds among his heirs, or to pay specific legacies. In such cases, neither an heir nor a legatee has any interest in the realty subject to execution at law.[153] His creditors may, however, generally reach such interests by resorting to proceedings in equity.[154]

[150] McClellan v. Solomon, 23 Fla. 437, 11 Am. St. Rep. 381; Proctor v. Newhall, 17 Mass. 81; Douglass' Lessee v. Massie, 16 Ohio, 271, 47 Am. Dec. 375; note to Hyde v. Barney, 44 Am. Dec. 338.

[151] Humphreys v. Humphreys, 1 Yeates, 427; De Haas v. Bunn, 2 Pa. St. 335, 44 Am. Dec. 201.

[152] See ante, § 131; Stout v. La Follette, 64 Ind. 369.

[153] Hess v. Shorb, 7 Pa. St. 231; Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Reed v. Davis, 95 Ga. 202; Ricketson v. Merrill, 148 Mass. 76; Eneberg v. Carter, 98 Mo. 647, 14 Am. St. Rep. 664.

[154] Daniels v. Eldredge, 125 Mass. 356; Lang v. Brown, 21 Ala. 179, 56 Am. Dec. 244; Sparhawk v. Cloon, 125 Mass. 263; Ricketson v. Merrill, 148 Mass. 76.

Digitized by Google

§ **184. The Interest of a Mortgagee** is a legal interest. He is invested with full legal title. But this title is vested in him only for security, and can be of no advantage, except when held by the owner of the mortgage debt. It would be useless to permit the sale of the mortgagee's legal title under execution, if he were still to remain the holder of the indebtedness. The indebtedness, being a mere chose in action, was not subject to execution. Hence, at common law, the interest of the mortgagee, both in regard to the indebtedness and to the real estate, was not subject to execution. "Until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action. It is but an incident attached to the debt; it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. There is no way to render a mortgage vendible but by allowing the debt to go with it; and this would be repugnant to all rule, for it is well understood that a chose in action is not the subject of sale on execution. When the mortgagee has taken possession of the land, the rents and profits may, perhaps, then become the subject of computation and sale. Until then, the attempt would be useless." [155]

[155] Jackson v. Willard, 4 Johns. 43; Brown v. Bates, 55 Me. 520, 92 Am. Dec. 613; Trapnall v. State Bank, 18 Ark. 53; Rickert v. Maderia, 1 Rawle, 329; Coombs v. Warren, 34 Me. 89; Randall v. Farnham, 36 Me. 86; State v. Lawson, 1 Eng. 269; Huntington v. Smith, 4 Conn. 235; Cooper v. Martin, 1 Dana. 23; Portland Bank v. Hall, 13 Mass. 207; Blanchard v. Colburn, 16 Mass. 345; Eaton v. Whiting, 3 Pick. 484; Smith v. People's Bank, 24 Me. 185; Morris v. Mowatt, 2 Paige, 586, 22 Am. Dec. 661; Moore v. Mayor of N. Y., 8 N. Y. 110, 59 Am. Dec. 473; Morris v. Barker, 82 Ala. 617; Brooks v. Kelly, 63 Miss. 617.

Digitized by Google

In a majority of the states, the interest of a mortgagee is a mere lien, and, hence, can never be subject to execution as real property until, by his purchase at a foreclosure sale, his lien has developed into title, either absolute or conditional. Where, however, the common-law rule still prevails, and the mortgagee has a legal estate, the cases speaking upon this subject deny that it is subject to execution at any time prior to his taking possession of the property for condition broken. We know, however, of no decision affirming the right to levy upon and sell his interest, even after that time, and are inclined to the opinion that, as long as the relation of debtor and creditor exists between him and the mortgagor, with its consequent right to the latter, on paying the debt, to become reinvested with the legal title to the property, that no sale of it can be made under an execution against the mortgagee. The mortgagee's interest cannot be sold under an execution against him and the mortgagor jointly, any more than it can under a writ against him alone.[156] The rule exempting the interest of a mortgagee from execution as real estate is not confined to mere formal mortgages; but applies in all cases where the true relation of the parties is that of mortgagor and mortgagee, though their apparent relation is that of grantor and grantee. Thus, a conveyance absolute in its terms may be proved to have been made for the purpose of securing the payment of a debt due from the grantor to the grantee. If so, the interest of the latter, as to persons having notice of the purpose of the deed, is that of a mere mortgagee, and is not subject to execution.[157]

[156] Buck v. Sanders, 1 Dana, 188.

[157] Harman v. May, 40 Ark. 146; Clark v. Watson, 141 Mass. 248.

Digitized by Google

§ 185. A Dowress did not, at common law, have any estate in the lands until assignment of her dower was made.[158] Previous to her assignment, her interest is a mere chose in action—nothing but a right, by appropriate proceedings, to compel the assignment to be made. Wherever the interest of the dowress remains subject to common-law rules, and free from statutory innovations, it is clear, upon principle, that it cannot be levied upon under execution.[159]

The dower interest which a wife, by the common law, had in the lands of her husband was not subject to be defeated by any transfer to which she was not a party. In the case of a transfer made under an execution sale, we do not understand that she could be affected, whether she was a party to the judgment or not. Her interest could not be taken under execution against her, because, until the death of her husband and the assignment of dower to her, she had no estate subject to execution. If the real property of her husband was levied upon and sold under an execution against him, the lien of which did not antedate the marriage, the title of the purchaser was none other than could have been vested in him by the voluntary conveyance of the husband at the date of the inception of the lien, and, hence, after the death of the husband,

[158] Freeman on Cotenancy and Partition, §§ 108, 121.

[159] Pennington v. Yell, 6 Eng. 212, 52 Am. Dec. 262; Newman v. Willetts, 48 Ill. 534; Blain v. Harrison, 11 Ill. 384; Hoots v. Graham, 23 Ill. 81; Nason v. Allen, 5 Greenl. 479; Gooch v. Atkins, 14 Mass. 378; Waller v. Mardus, 29 Mo. 25; Torrey v. Minor, 1 Smedes & M. Ch. 489; Tompkins v. Fonda, 4 Paige, 448; Ritchie v. Putnam, 13 Wend. 524; Graham v. Moore, 5 Harr. (Del.) 318; Wallis v. Doe, 2 Smedes & M. 220; Ligon v. Spencer, 58 Miss. 37; Hayden v. Weser, 1 Mackey, 457; Rausch v. Moore, 48 Iowa, 611, 30 Am. Rep. 412; Petty v. Malier, 15 B. Mon. 591; Harper v. Clayton, 84 Md. 346, 57 Am. St. Rep. 407; Falkner v. Thurmond (Miss.), 23 So. 584; Aiken v. Hassell, 98 N. Y. 186, 195.

Digitized by Google

the execution sale constituted no impediment to the right of the wife to compel the assignment of her dower in the lands sold.[160]

A different rule prevails in Connecticut,[161] Georgia, and Pennsylvania, whenever the dowress, though no assignment be made, is in possession of the lands of her deceased husband.[162] In some of the states, a widow has, upon the death of her husband, a different interest from that held by a dowress at common law—an interest giving her a right of possession, and making her substantially a tenant in common with the children or other heirs of the deceased.[163] In such states, we should think that, upon principle, her interest would be subject to execution, unless exempted by statute.

In Missouri, it has been decided that the provisions of the revised statutes permitting a widow to transfer her unassigned dower does not subject it to execution, "as many reasons exist why a voluntary alienation should be permissible and involuntary alienation should be prohibited."[164] In Iowa, the dower interest of a wife has, by statute, been enlarged to an estate in fee. It is, nevertheless, not subject to execution prior to its assignment.[165]

[160] Wood v. Morgan, 56 Ala. 397; Ayer v. Spring, 9 Mass. 8; Price v. Hobbs, 47 Md. 359; Dayton v. Cooser, 51 Minn. 406; McClanahan v. Porter, 10 Mo. 746; Butler v. Fitzgerald, 43 Neb. 192, 47 Am. St. Rep. 741; Shell v. Duncan, 31 S. C. 547; Ficklin v. Rixey, 89 Va. 832, 37 Am. St. Rep. 891.

[161] Greathead's Appeal, 42 Conn. 374.

[162] Pitts v. Hendrix, 6 Ga. 452; Thomas v. Simpson, 3 Pa. St. 60.

[163] Stedman v. Fortune, 5 Conn. 462; Stokes v. McAllister, 2 Mo. 163; C. & A. Turnpike v. Jarrett, 4 Ind. 215; Wooster v. Iron Co., 38 Conn. 256; Crocker v. Fox, 1 Root, 323.

[164] Young v. Thrasher, 61 Mo. App. 413.

[165] Rausch v. Moore, 48 Iowa, 611, 30 Am. Rep. 412.

Digitized by Google

§ 186. Husband's Interest in Wife's Lands, and in Tenancies by Entireties.—At common law, the husband was, by virtue of the marital relation, seised of a freehold estate in all the real property of his wife, whether her title existed at the date of the marriage or accrued afterward. The husband's estate, created by virtue of the marriage alone, continued only during the joint lives of the husband and wife; but, by the birth of living issue of the marriage, the husband became tenant by curtesy, and entitled to an estate for his life, though his wife should die before him. The life estate of which the husband was seised, whether by virtue of the marriage, or as tenant by curtesy, was his property as absolutely as though it had been conveyed to him prior to the marriage. It was not the property of the wife; for, by virtue of the marriage, in the one case, and the birth of living issue in the other, the law took the estate from her, and gave it to her husband. He could dispose of either estate in any manner he thought proper. His creditors were entitled to treat it as assets, the same as other estates for life. Wherever the common law on this subject still prevails, the husband's estate in the lands of his wife, whether existing by marital right or as tenant by curtesy, is subject to execution.[166] Hence, when a widow who has had her

[166] Canby v. Porter, 12 Ohio, 79; Schneider v. Stalhr, 20 Mo. 269; Harvey v. Wickham, 23 Mo. 112; Burd v. Dansdale, 2 Binn. 80; Schermerhorn v. Miller, 2 Cow. 439; Murray v. Fishback, 5 B. Mon. 412; Montgomery v. Tate, 12 Ind. 615; Butterfield v. Beall, 3 Ind. 203; Neil v. Johnson, 11 Ala. 615; Cheek v. Waldrum, 25 Ala. 152; Pringle v. Allen, 1 Hill Ch. 135; Barber v. Root, 10 Mass. 260; Roberts v. Whiting, 16 Mass. 186; Litchfield v. Cudworth, 15 Pick. 23; Shortall v. Hinckley, 31 Ill. 219; Gillis v. Brown, 5 Cow. 388; Mitchell v. Sevier, 9 Humph. 146; Metropolitan Bank v. Hitz, 1 Mackey, 111; Matter of Winne, 1 Lans. 514; Wickes v. Clarke, 8 Paige, 172. In Pennsylvania the rule is otherwise, and the husband's life estate

Digitized by Google

dower assigned to her again marries, her second husband acquires an estate in the lands held in dower, which is subject to execution.[167] Nor is it necessary that the estate of the wife should be one entitling her to the possession of the property. It is sufficient that it may give her a right of possession at some time during the coverture. Hence, if she is seised of a vested remainder, to take effect at the death of the tenant for life, her husband has an estate therein subject to execution.[168] But in some of the states, all the husband's interest in the property of his wife is, by statute, exempt from execution.[169] Lands may be held by the husband and wife as tenants by entireties,[170] in which case each has a right of survivorship, incapable of being defeated by any act, omission, or default of the other. There is no doubt that a sale under execution against either of the spouses cannot operate to sever the tenancy by the entireties, or to defeat the other's right of survivorship.[171]

But if the husband has, by common law, certain estates and rights in real property, belonging wholly to his wife, can he have estates and rights of less dig-

in the lands of his wife is not subject to execution. Snavely v. Wagner, 3 Pa. St. 275, 45 Am. Dec. 640; Gordon v. Ingraham, 1 Grant Cas. 156; Kintz v. Long, 30 Pa. St. 502; Stanley v. Benham, 52 Ark. 354; McCaskill v. McCormac, 99 N. C. 548. But the present code of this state exempts from execution the interest of a tenant by the curtesy initiate. Bruce v. Nicholson, 109 N. C. 202, 26 Am. St. Rep. 562.

[167] McConihe v. Sawyer, 12 N. H. 396.

[168] Brown v. Gale, 5 N. H. 416.

[169] Junction R. R. Co. v. Harris, 9 Ind. 184; White v. Dorris, 35 Mo. 181; Ault v. Eller, 38 Mo. App. 598; Churchill v. Hudson, 34 Fed. Rep. 14.

[170] For description of this tenancy, see Freeman on Cotenancy and Partition, §§ 63-76.

[171] Ante, § 172 b; Bruce v. Nicholson, 109 N. C. 202, 26 Am. St. Rep. 562.

Digitized by Google

nity and value in real property belonging partly to her and partly to himself? The answer given by a majority of the authorities on the subject is that, though the lands be held by entireties, the husband has, during the joint lives of the spouses, the right to the possession and enjoyment of the property as fully as if the title thereto were vested exclusively in his wife. It follows, as a result from this, that this life estate is subject both to voluntary and to involuntary transfer.[172] This opinion has not received universal concurrence,[173] and, whether correct or incorrect, upon common-law principles, is entirely inapplicable in those states where the marital rights of husbands have been modified or destroyed by statute, and the realty of wives exempted from levy and sale under executions against their husbands.[174] In truth, the general tendency of the recent decisions construing statutes protecting a wife's interest in her separate property from the acts of her husband or the claims of his creditors, has been to extend the operation of those statutes to tenancies by the entireties, and, hence, to hold that where they exist, neither the voluntary nor involuntary alienation by or against her husband can affect her interest therein, or vest any title in the purchaser entitling him, as against the wife, to any

[172] Freeman on Cotenancy and Partition, §§ 73, 74; Ames v. Norman, 4 Sneed, 692; Stoebler v. Knerr, 5 Watts, 181; French v. Mehan, 56 Pa. St. 289; McCurdy v. Canning, 64 Pa. St. 41; Bennett v. Child, 19 Wis. 362; Litchfield v. Cudworth, 15 Pick. 23.

[173] Jackson v. McConnell, 19 Wend. 178; Thomas v. De Baum, 1 McCarter Ch. 40; Chandler v. Cheney, 37 Ind. 408; Vinton v. Beamer, 55 Mich. 559.

[174] McCurdy v. Canning, 64 Pa. St. 41; Chandler v. Cheney, 37 Ind. 408. In the last-named state it has also been determined that crops raised by the husband on lands held by himself and wife in entireties are not subject to execution. Patton v. Rankin, 68 Ind. 245.

Digitized by Google

possession of, or benefit in, lands held by the entireties, though her husband is still living.[175]

In New York, however, it has been held that statutes, of the character to which we have been referring, in effect make the husband and wife tenants in common of the use and possession of the estate during their joint lives, and, hence that if the husband executes a mortgage which is subsequently foreclosed, the purchaser at the foreclosure sale becomes, in effect, a tenant in common with the wife, subject to her paramount rights of survivorship, and, hence, entitled to share with her in the possession of the property.[176] If such be the case, we see no reason why the same result would not follow a sale under a judgment on execution against the husband, though not based upon a mortgage. In Michigan, on the other hand, neither a husband nor wife can mortgage an estate vested in them by the entireties, and any instrument which attempts to make such a conveyance or mortgage is void.[177] In Indiana, a mortgage upon property held by the entireties, though executed by both the husband and wife, if to secure a loan made to him, cannot be enforced against her, though a mechanic's lien may be enforced against her, if based upon a just claim for materials used in constructing a building on the premises, with her knowledge and without objection on her part.[178] In Arkansas, a husband and wife each gave a mortgage, purporting to embrace the undivided one-half of lands

[175] McCubbin v. Stanford, 85 Md. 378, 60 Am. St. Rep. 329; Bruce v. Nicholson, 109 N. C. 202, 26 Am. St. Rep. 562; Cole M. Co. v. Collier, 95 Tenn. 115, 49 Am. St. Rep. 921; Corinth v. Emery, 66 Vt. 505, 25 Am. St. Rep. 780.

[176] Hiles v. Fischer, 144 N. Y. 306, 43 Am. St. Rep. 762.

[177] Naylor v. Minock, 96 Mich. 182, 35 Am. St. Rep. 595.

[178] Wilson v. Logue, 131 Ind. 191, 31 Am. St. Rep. 426.

Digitized by Google

held by them by the entireties. Both mortgages were executed to secure the same debt. It was, hence, contended that they should be construed as one instrument to which both the husband and wife were parties. This contention was overruled, and, the husband having died, the mortgage executed by him was held to be entirely inoperative as against his wife's right of survivorship; but that executed by her was held to be valid and enforceable as to the undivided one-half of the property.[179]

§ 187. Trust Estates were not, at common law, regarded as assets,[180] nor were they subject to debts due to private persons, and it is doubtful whether they were liable to crown debts. "But, by the statute 13 Elizabeth, c. 4, it is enacted that if any person who is an accountant, or indebted to the crown, shall purchase any lands in the name of other persons, to his own use, all such lands shall be taken for the satisfaction of the debts due by such persons to the crown."[181] To enable private creditors to obtain satisfaction of their debts by extending lands held in trust, the statute of 29 Charles II., c. 3, enacted "that it shall and may be lawful for every sheriff, or other officer to whom any writ or precept shall be directed, upon any judgment, statute, or recognizance, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, etc., as any other person or persons shall be seised or possessed in trust for him against whom

[179] Branch v. Polk, 61 Ark. 388, 54 Am. St. Rep. 266.

[180] Bennett v. Box, 1 Ch. Cas. 12; Hogan v. Jacques, 19 N. J. Eq. 123, 97 Am. Dec. 644; Wilkes v. Ferris, 5 Johns. 335, 4 Am. Dec. 364; Roads v. Symmes, 1 Ohio, 313, 13 Am. Dec. 621; Pratt v. Phillips, 1 Sneed. 543, 60 Am. Dec. 162.

[181] 1 Greenl. Cruise, 412.

Digitized by Google

the execution is so sued, like as the sheriff, or other officer, might or ought to have done if said party, against whom the execution shall be so sued, had been seised of such lands, tenements, etc., of such estate as they be seised of in trust for him at the time of the said execution sued, which lands, tenements, etc., by force and virtue of such execution, shall accordingly be held and enjoyed, freed, and discharged from all encumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; and if any cestui que trust shall die leaving a trust in fee-simple to descend to his heir, then, and in every such case, such trust shall be deemed and taken, and is hereby declared to be, assets by descent; and the heir shall be liable to and chargeable with the obligation of his ancestors, for and by reason of such assets, as fully and amply as he might or ought to have been if the estate in law had descended to him in possession in like manner as the trust descended."

The tendency of the decisions has been such as to restrict the operation of this statute to the estates therein clearly and expressly designated. It by no means follows that, in states which have adopted this or a similar statute, all equitable estates are subject to execution. On the contrary, it will be found that the equitable interests coming within the statutes are comparatively rare. In King v. Ballett, [182] the statute was held not to extend to estates for years. In other cases it has been held that the interest of a cestui que trust is not within the statute, where others are also

[182] 2 Vern. 248.

Digitized by Google

beneficiaries under the trust.[183] "The words of the statute are 'seised or possessed in trust for him against whom execution is sued, like as the sheriff might do if that person were seised.' This statute made a change in the common law, and—up to a certain extent, at least—made a trust the subject of inquiry and cognizance in a legal proceeding. We think the trust that is to be thus treated must be a clear and simple trust for the benefit of the debtor, the object of the statute appearing to us to be to remove the technical objection arising from the interest in land being vested in another person, where it is so vested for the benefit of the debtor." [183a] The operation of this and similar statutes seems to be confined to cases where a cestui que trust, by virtue of a conveyance or devise, is entitled to the full and exclusive benefit and enjoyment of an estate, the legal title to which is vested in another.

§ 188. Trust Estates—English Statutes Adopted in America.—The statute of 29 Charles II., referred to in the preceding section, did not extend to the provinces. In some of the United States it has never been adopted, and the rule in regard to taking trust estates under execution remains as at common law.[184] This statute was, however, re-enacted, in substance or in form, in many of the states; and where so enacted its effect was confined, as under the English decisions, to clear and unmixed trusts. In Alabama perfect equities are

[183] Harris v. Pugh, 4 Bing. 335; Doe v. Greenhill, 4 Barn. & Ald. 684; Lynch v. Utica Ins. Co., 18 Wend. 236; Harrison v. Battle, 1 Dev. Eq. 537.

[183a] Doe v. Greenhill, 4 Barn. & Ald. 690.

[184] Russell v. Lewis, 2 Pick. 508; Merrill v. Brown, 12 Pick. 216; Rawson v. Plainsted, 151 Mass. 71.

Digitized by Google

subject to execution;[185] and it has been said by the supreme court of that state that "the perfect equity which the statute subjects to levy and sale under execution at law is of one class only—that of a vendee who has paid the purchase money"; and that the "statute subjects to levy and sale an equity of redemption, a perfect equity—the defendant having paid the purchase money—a legal title, or a vested legal interest in possession, reversion, or remainder, whether it is an entire estate or held in common with others."[186] Hence, where a conveyance is made to a trustee with power to sell the property conveyed on default being made in the payment of a specified debt, and where the law grants to the debtor the privilege of redeeming from a sale made under such trust, he nevertheless has not, after such sale, that perfect equity which is subject to execution. In the District of Columbia "no property but that in which the judgment debtor has a legal title is subject to execution at law."[187] In Arkansas the statute declares subject to execution all real estate whereof the defendant or any person for his use was seised in law or equity on the day of the rendition of the judgment, or at any time thereafter. The object of the original enactment of this statute was to subject to execution lands purchased from the United States for which full payment had been made, but to which no patent had issued. The interpretation of the statute has, therefore, been such as to confine it to perfect or simple equities—those in which the interests of the

[185] Code Ala., § 2871; see Wilson v. Beard, 19 Ala. 629; Doe v. McKinney, 5 Ala. 719.

[186] Shaw v. Lindsey, 60 Ala. 344; Smith's Ex'r v. Cockrell, 66 Ala. 64.

[187] Starr v. United States, 8 App. D. C. 552; Droop v. Ridenour, 9 App. D. C. 95.

Digitized by Google

beneficiary were so clear that no sacrifice of his estate was likely to follow from subjecting it to execution. Hence, if he makes a deed of trust to secure the payment of certain debts therein specified, the equitable rights retained by him are not subject to execution.[188] In Delaware and Georgia, perfect or passive equities, as where lands have been purchased and complete payment made, so that the purchaser is entitled to a conveyance, are subject to execution.[189]

The chapter of the statutes of Illinois relating to judgments, decrees, and executions, defines the term "real estate," as used therein, as including "lands, tenements, hereditaments, and all legal and equitable rights and interests therein and thereunder, including estates for life of the debtor or of another person, and estates for years and leasehold estates when the unexpired term exceeds five years." [190] Prior to the enactment of this statute, equitable interests in real property were not subject to execution in this state.[191] Since its enactment they are.[192] It has, nevertheless, been held that where the trust is active, "requiring the continuance of the legal title in the trustees, to enable them to perform their duties," and where, in the performance of these duties, the trustees may either divide the property, or may sell it and distribute the proceeds among the persons entitled thereto, the latter, as they have no equitable estate in any specific part of the

[188] Pettit v. Johnson, 15 Ark. 55; Biscoe v. Royston, 18 Ark. 508; Pope's Heirs v. Boyd, 22 Ark. 538.

[189] McMullen v. Lank, 4 Houst. 648; Pitts v. Bullard, 3 Kelly, 5, 46 Am. Dec. 405.

[190] Starr & Curtis' Annotated Illinois Statutes, ed. 1896, p. 2330, § 3.

[191] West v. Schnebly, 54 Ill. 523.

[192] Laclede Bank v. Keeler, 108 Ill. 425; Wallace v. Monroe, 22 Ill. App. 602.

Digitized by Google

property, have no interest therein subject to execution.[193] Under similar circumstances the interest of a beneficiary is not subject to execution in Iowa.[194]

In Kentucky the estates embraced within the statute of 29 Charles II. are liable to execution,[195] but no others.[196] Trust estates are not liable in Michigan,[197] nor in New Jersey.[198] Mere trusts, pure and simple, are subject to execution in Mississippi;[199] but imperfect and complicated trusts are not.[200] This remark seems to be equally applicable to Missouri.[201] In New York "the Revised Statutes provide that lands, tenements, and real estate holden by any one in trust or for the use of another, shall be liable to debts, judgments and decrees, executions and attachments, against the person to whose use they are holden, in the cases and in the manner prescribed in the first chapter of the second part of the Revised Statutes."[202]

193 Potter v. Couch, 141 U. S. 296.

194 Meek v. Briggs, 87 Iowa, 610, 43 Am. St. Rep. 410.

195 Blanchard v. Taylor, 7 B. Mon. 645; Eastland v. Jordan, 3 Bibb, 186; Jones v. Langhorne, 3 Bibb, 453; Anderson v. Briscoe, 12 Bush, 344.

196 Allen v. Sanders, 2 Bibb, 94; Ormsby v. Tarascon, 3 Litt. 412; January v. Bradford, 4 Bibb, 566; Tyree v. Williams, 3 Bibb, 365, 6 Am. Dec. 663; Newsome v. Kurtz, 86 Ky. 277.

197 Gorham v. Wing, 10 Mich. 486; Trask v. Green, 9 Mich. 358; Lee v. Enos, 97 Mich. 276.

198 Hogan v. Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644; Vancleve v. Groves, 3 Green Ch. 330; Hoppock v. Cray (N. J.), 21 Atl. 624.

199 Presley v. Rodgers, 24 Miss. 520; Boarman v. Catlett, 13 Smedes & M. 149.

200 Hopkins v. Carey, 23 Miss. 54.

201 McIlvaine v. Smith, 42 Mo. 45, 97 Am. Dec. 295; Brant v. Robertson, 16 Mo. 129; Broadwell v. Yantis, 10 Mo. 403; Anthony v. Rogers, 17 Mo. 394; Wagner's Stats. 605; Gen. Stats., ed. of 1865, c. 160, sec. 6; Morgan v. Bouse, 53 Mo. 219; Hammond v. Johnson, 93 Mo. 198.

202 4 Wait's Practice, 37 d; see Wright v. Douglass, 3 Barb. 574; Brewster v. Power, 10 Paige, 567; Garfield v. Hatmaker, 15 N. Y.

Digitized by Google

In North Carolina, South Carolina, Tennessee, Texas, and Virginia, the decisions are in substantial harmony with those made under the statute of 29 Charles II.[203] Lands are not there subject to execution against a cestui que trust, unless the trustee could convey him the entire legal title without committing a breach of trust.[204] The condition of the title must be such that the purchaser at execution sale can be treated as having acquired the entire title, both legal and equitable. If the sale would leave any outstanding equity in any other person, then the property is not subject to execution.[205] The debtor must be in such a condition that the conveyance of the legal title would be decreed to him were he to sue for it.[206] "The statute of uses never executes the use while there is anything for the trustee to do necessary to the accomplishment of the trust created by the deed. It applies only in cases where there is nothing to be done by the trustee, as where an estate is given to one and his heirs simply in trust for another. In such case the title passes through the trustee directly to the cestui que trust,

475; Mallory v. Clark, 20 How. Pr. 418; 9 Abb. Pr. 358; Lynch v. Utica Ins. Co., 18 Wend. 236; Bogert v. Perry, 17 Johns. 351, 8 Am. Dec. 411; Kellogg v. Wood, 4 Paige, 578; Jackson v. Bateman, 2 Wend. 570; Guthrie v. Gardner, 19 Wend. 414; Foote v. Colvin, 3 Johns. 216, 3 Am. Dec. 478.

[203] Gillis v. McKay, 4 Dev. 172; Harrison v. Battle, 1 Dev. Eq. 537; Moore v. McDuffy, 3 Hawks, 578; Brown v. Graves, 4 Hawks, 342; Melton v. Davidson, 6 Ired. Eq. 194; Thompson v. Ford, 7 Ired. 418; Freeman v. Perry, 2 Dev. Eq. 243; Burgin v. Burgin, 1 Ired. 160; Shute v. Harder, 1 Yerg. 1, 24 Am. Dec. 427; Hurt v. Reeves, 5 Hayw. (Tenn.) 50; Smitheal v. Gray, 1 Humph. 491; White v. Kavanagh, 8 Rich. 377; Claytor v. Anthony, 6 Rand. 285; Coutts v. Walker, 2 Leigh, 280; Porter v. Lee, 88 Tenn. 782; Chase v. York Co. S. B. 89 Tex. 316, 59 Am. St. Rep. 48.

[204] Battle v. Petway, 5 Ired. 576, 44 Am. Dec. 59.

[205] Tally v. Reid, 72 N. C. 336.

[206] Love v. Smathers, 82 N. C. 369; Davis v. Inscoe, 84 N. C. 403.

Digitized by Google

the latter becoming the legal owner by virtue of this transmission caused by the statute. But where the trustee is charged with the performance of some duty in connection with the property, which cannot be performed except by authority of the legal estate vested in him, the statute has no application, because, if it did, it would defeat the very purpose intended by the execution of the deed." [207] A testator devised lands to D. and B., in trust for the use and benefit of the testator's son and daughter, with directions to divide such lands equally between the son and daughter, to be used by each, respectively, during his or her natural life, and, after the death of either, to divide his or her share equally among his or her children. The executors made the division of the lands between the son and daughter, who, respectively, went into the possession of the parts assigned to them. After this, the part allotted to the son was sold under execution against him. But the court was clear that no title passed by the sale: 1. Because the debtor was entitled to a portion only of the land, and, hence, could not compel a conveyance of the legal title to him; and 2. Because it was necessary that the executors should retain the title to enable them to perform the duty enjoined on them of dividing the son's share among his children upon his death.[208]

In Nebraska [208a] and Ohio, equities are not subject to execution unless accompanied by possession, and, even then, it is not clear whether the equity is trans-

[207] Bristow v. McCall, 16 S. C. 548.

[208] Bristow v. McCall, 16 S. C. 548; see, also, Bunch v. Hardy, 3 Lea, 543.

[208a] Shoemaker v. Harvey, 43 Neb. 75; First N. B. v. Tighe, 49 Neb. 299.

Digitized by Google

ferred, or only the possessory interest.[209] Section 1190 of the Revised Statutes of Florida declares that "lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations, shall be subject to levy and sale under execution."

By section 1 of chapter 76 of the Revised Statutes of Maine of 1883, it is declared "real estate attachable, including the right to cut timber and grass, as described in chapter 81, may be taken to satisfy an execution." The law applicable to attachment, in turn states, in section 56 of chapter 81, that "all real estate liable to be taken in execution, as provided in chapter 76, the right to cut and carry away grass and timber from lands sold by this state, or Massachusetts, the soil of which is not so sold, and all other rights and interest in real estate, may be attached on mesne process, and held to satisfy a judgment recovered by the plaintiff." By section 1 of chapter 172 of the Public Statutes of Massachusetts, "all the lands of a debtor in possession, remainder, or reversion, all his rights of entry in lands, and of redeeming mortgaged lands, and all such lands and rights which have been fraudulently conveyed by him with intent to defeat, delay, or defraud his creditors, or which have been purchased, or directly or indirectly paid for by him, but the record title thereto retained in the vendor, or conveyed to a third person, with intent to defeat, delay, or defraud the creditors of the debtor, or on a trust for him, express or implied, whereby he is entitled to a present conveyance, may, except as provided in chap-

[209] Roads v. Symmes, 1 Ohio, 281, 13 Am. Dec. 621; Douglass v. Huston, 6 Ohio, 156; Scott v. Douglass, 7 Ohio, 227; Miner v. Wallace, 10 Ohio, 403; Haynes v. Baker, 5 Ohio St. 255.

Digitized by Google

ter 123, be taken in execution for his debts." The chapter 123 herein referred to is that providing for homesteads and their exemption from execution. "All property, including franchises, or rights or interests therein, of the judgment debtor, shall be liable to an execution, except as in this section provided." [210] The exceptions referred to are those specifying the quantity of property which may be held by a judgment debtor as exempt from execution. The statutes of Rhode Island appear to authorize the levy of execution upon real estate or any interest therein.[211]

In Vermont, "houses, lands, and tenements belonging to a person, in his own right in fee, or for his own life or the life of another paying no rents for the same, or for years, or an unlimited time, paying rents for the same, and rights in equity of redeeming lands mortgaged, or in reversion or remainder, shall stand charged with the debts and demands owing by such person, as well as his personal estate, and may be taken in execution for the same at the election of the creditor, unless the debtor, his agent, or attorney, exposes and tenders personal estate sufficient to satisfy the execution and the charges." [212] "Lands, tenements, and real estate holden by anyone in trust for use of another shall be liable to debts, judgments, executions, and attachments against the person to whose use they are holden." [213] "Lands and tenements, including vested interests therein, and permanent leasehold estates, renewable forever, and goods and chattels not

[210] 1 Hill's Laws of Oregon, p. 353, § 282.
[211] General Laws of Rhode Island, ed. 1896, p. 897, §§ 11 and 12.
[212] Revised Laws of Vermont, ed. 1880, § 1575.
[213] Sanborn & Berryman's Annotated Statutes, Wisconsin, § 2992.

Digitized by Google

exempt by law, shall be subject to the payment of debts and shall be liable to be taken in execution." [214]

In California, Colorado, Connecticut, Indiana, Iowa, Kansas, Maryland, Minnesota, Montana, New Hampshire, Nevada, Pennsylvania, Utah, and Washington,[215] equitable estates are subject to execution much more extensively than under the statute of 29 Charles II. In fact, in most of these states all beneficial estates are liable to be taken in execution, irrespective of the question whether they are legal or equitable.[216]

§ 189. Resulting Trust.—When the consideration for a conveyance is paid by one man, but the deed is taken in the name of another, the parties being strangers to each other, a resulting or presumptive trust at once arises in favor of the one by whom the consideration was furnished, entitling him to hold the other as his trustee. Some difference of opinion has been manifested whether the beneficiary under such a trust has, under the act of 29 Charles II., and similar statutes, an estate subject to execution. The object of taking the conveyance in the name of a person other than

[214] Revised Statutes Wyoming, ed. 1887, § 2721.

[215] O'Connell v. Taney, 16 Colo. 353, 25 Am. St. Rep. 275; Aldrich v. Boice, 56 Kan. 170; Shanks v. Simon, 57 Kan. 385; Paisley v. Holshu, 83 Md. 325; Atwater v. Manchester S. B., 45 Minn. 341; C. C. P. of Mont., § 1218; Drake v. Brown, 68 Pa. St. 223; Anwerter v. Mathoit, 9 S. & R. 397; Comp. Laws, Utah, ed. 1888, § 3426; Calhoun v. Leary, 6 Wash. 17.

[216] Davenport v. Lacon, 17 Conn. 278; State Bank v. Macy, 4 Ind. 362; Pennington v. Clifton, 11 Ind. 162; Hutchins v. Hanna, 8 Ind. 533; Crosby v. Elkader Lodge, 16 Iowa, 399; Harrison v. Kramer, 3 Iowa, 543; Kiser v. Sawyer, 4 Kan. 433; Miller v. Allison, 8 Gill & J. 35; McMechen v. Marman, 8 Gill & J. 57; Hopkins v. Stump, 2 Har. & J. 301; Reynolds v. Crawford, 7 Har. & J. 52; Pritchard v. Brown, 4 N. H. 397; 17 Am. Dec. 431; Upham v. Varney, 15 N. H. 462; Garro v. Thompson, 7 Watts, 416; Drake v. Brown, 68 Pa. St. 223; Kennedy v. Nunan, 52 Cal. 326.

Digitized by Google

the one by whom its consideration was paid may be innocent; but it is more frequently for the purpose of concealing the real ownership of the property from creditors, who, upon knowing the truth, would at once institute measures looking toward the compulsory satisfaction of their demands. In either event, the majority of the authorities inclines to the view that the estate may be taken in execution the same as though the trust was expressed in the conveyance.[217] This majority is opposed by a minority very nearly its equal in number and importance.[218]

§ 189a. Trusts and Devises to Withdraw Property from Execution.—We now approach a subject of great importance, and one in respect to which the authorities are not in entire harmony. The efforts of the owner of property to withdraw it from execution against him, while he retains some beneficial interest therein for

[217] Slattery v. Jones, 96 Mo. 216, 9 Am. St. Rep. 344; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Tevis v. Doe, 3 Ind. 129; Bobb v. Woodward, 50 Mo. 95; Foote v. Colvin, 3 Johns. 216; Guthrie v. Gardner, 19 Wend. 414; Wait v. Day, 4 Denio, 439; Ontario Bank v. Root, 3 Paige, 478. But it is otherwise under the present statutes of New York. Garfield v. Hatmaker, 15 N. Y. 475. In Maine, property bought by husband in name of wife may be taken in execution, the statute raising resulting trust in his favor. Low v. Marco, 53 Me. 45; Thomas v. Walker, 6 Humph. 93; Evans v. Wilder, 5 Mo. 313; Rankin v. Harper, 23 Mo. 579; Dunnica v. Cox, 24 Mo. 167, 69 Am. Dec. 420; Herrington v. Herrington, 27 Mo. 560; Dewey v. Long, 25 Vt. 564. But in Missouri and Vermont the interest acquired by the purchaser seems to be the equity only, and not the legal title.

[218] Harrison v. Hollis, 2 Nott & McC. 578; Bauskett v. Holsonback, 2 Rich. 624; Jimmerson v. Duncan, 3 Jones, 537; Mitchell v. Robertson, 15 Ala. 412; Wilson v. Beard, 19 Ala. 629; Gentry v. Harper, 2 Jones Eq. 177; Gowing v. Rich, 1 Ired. 553; Maynard v. Hoskins, 9 Mich. 485, by statute; Goodbar v. Daniel, 88 Ala. 583, 16 Am. St. Rep. 76; Mayer v. Wilkins, 37 Fla. 244; Everett v. Raby, 104 N. C. 479, 17 Am. St. Rep. 685; Gilbert v. Stockman, 81 Wis. 602, 29 Am. St. Rep. 922.

Digitized by Google

himself or his family, are necessarily opposed and counteracted by the statutes and decisions denouncing all conveyances and devises the design or operation of which is to hinder, delay, or defraud creditors. Each debtor is under both a moral and a legal obligation to pay his debts, and he cannot be permitted to evade such obligation by creating any trust for the benefit of himself or his family.[219] If there can be any exception to this rule, it must be in favor of a woman who, in contemplation of marriage, conveys her property to a trustee to be held for her use and benefit for the purpose of paying the income to her, and who in the trust provides that such income shall not be subject either to the disposition of her husband, or to the claims of his or her creditors. It is believed, however, that even in a case of this character the property cannot be withdrawn from the reach of her creditors after marriage, and that if debts are created by her of a character which the law deems chargeable against her separate estate, any income in the hands of her trustees may be reached and applied thereto by proceedings in equity.[220]

[219] Mackason's Appeal, 42 Pa. St. 390, 82 Am. Dec. 517; Lloyd v. McCaffrey, 46 Pa. St. 415; Ghormley v. Smith, 139 Pa. St. 584, 23 Am. St. Rep. 215.

[220] Brown v. Magill, 87 Md. 161, 67 Am. St. Rep. 334. In this case the court referred with approval to previous decisions in that and other states affirming the right of a donor in creating a trust in favor of a third person, to restrict the right of alienation, and hence to withdraw the property and its income from the creditors of the beneficiary, because, while, under our system, creditors may reach all the property of the debtor not exempt by law, they cannot enlarge the gift of the founder of the trust and take more than he has given. The court said: "Even that class of cases should be carefully guarded, and the courts should not be inclined to exempt property from its usual incidents of the right of alienation and liability for debts unless the language of the donor be free from doubt.

Digitized by Google

While a parent is under no obligation to pay either the present or future debts of his child, he ought to feel a solicitude for its future welfare, and a desire to

But it is going too far and is too violently assaulting the policy of the law of this state, as indicated above, to permit a person to convey property owned by him to a trustee, and still retain full enjoyment of the income and revenues from it through the instrumentality of the trustee, and yet have the interest he retains for himself, worth, it may be, thousands or tens of thousands of dollars per annum, so fettered by his own act that it cannot be disposed of or be reached by his creditors. It is true that our land records are open to the public, and, in contemplation of law, what is properly recorded therein is presumed to be known by all, yet the fact remains that if a person has once owned property and continues to occupy it or use it just as he has always done, it would occur to but few persons, if any, at least in ordinary transactions, that he must inquire, perhaps employ counsel, to ascertain whether there had been any change in the legal status of such property. It may be argued that this may happen in the cases we have already said are lawful in this state, where the bounty is bestowed upon third persons, and to some extent that may be true, but in those cases persons dealing with them may perhaps be expected to ascertain what the party receives—what interest in the property was given to him—but in the case before us he would not only have to find out what property he owned in the beginning, but from time to time examine the records to see whether the former and still ostensible owner of it continued to retain any interest that was liable for his debts. It cannot be denied that property is deprived of some of its greatest value to the community in which it is held or located, when beyond the power of alienation or reach of the creditors of its present owners. To hold that a grantor can retain all the use and enjoyment of his property for life 'free from the incidents of property and not subject to his debts, would be a dangerous and startling proposition to sanction.' We do not think it can be sustained by reason or authority. So far as we are aware the authorities are the other way: Warner v. Rice, 66 Md. 436; 4 Kent's Commentaries, 311; Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517; Ghormley v. Smith, 139 Pa. St. 584, 23 Am. St. Rep. 215; McIlvaine v. Smith, 42 Mo. 45, 97 Am. Dec. 295 (approved as to this point in Lampert v. Haydel, 96 Mo. 439, 9 Am. St. Rep. 358); Pacific Nat. Bank v. Windram, 133 Mass. 175; Jackson v. Von Zeidlitz, 136 Mass. 342.

But conceding this to be the law as to those who are sui juris, how far does it apply to married women or to a deed made by one in contemplation of marriage? That is the important and most

Digitized by Google

guard it against future penury. The greater the incapacity or improvidence of the child, and the consequent probability of its becoming subject to obliga-

difficult question before us. The doctrine of the separate estate of a married woman was purely a creature of equity and worked a radical change in the principles of the common law applicable to the marital relation, as affecting the rights of property between husband and wife. In Buckton v. Hay, L. R. 11 Ch. Div. 645, the master of the rolls said that 'it was considered that to give it to her without restraint would be practically to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed, restraining her from anticipating her income, and thus fettering the free alienation,' and in Tullett v. Armstrong, 4 Myine & C. 377, Lord Chancellor Cottenham said: 'The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together.' And again: 'It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate, and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation.' In other words, the reason that the English courts permitted these restrictions on property of a married woman, although they had denied their validity as against the property of persons sui juris, was that her right to hold property free from her husband's control was created for her by courts of equity and the chancellors thought she was not sufficiently protected from her husband without this restraint. It was very reluctantly done and only because it was deemed necessary for the protection of wives from their husbands, as a study of the English cases will show. What we have said above in regard to these restraints imposed by third persons will, of course, apply to a married woman when she is the recipient of the bounty of another, but we cannot consent to the establishment of a doctrine in this state which will enable a married woman, or a woman in contemplation of marriage, to place her property that would be otherwise responsible for debts contracted with reference to it beyond the reach of her creditors and still enjoy the use and benefit of it as fully and completely as she had done before. We do not mean to intimate that she cannot so settle her separate property as to place it beyond the control and reach of her husband and his creditors, but, when the rights of her creditors are involved, and the property in question be of

Digitized by Google

tions which it is unable to meet by its own efforts, the greater ought to be the solicitude and forethought of the parent in making some provision for its mainte-

the character that would be liable to such creditors but for such restraints, she would not be permitted to escape the payment of her just debts by reason of her own declaration that such property should not be liable for her debts, or that the income should be paid to her alone and not to another, notwithstanding it is made a matter of record before the debts are contracted. There is no necessity to establish such a doctrine for her protection against her husband, as under the laws of this state she has ample protection against him and his creditors, and we do not 'assume that husbands will be constantly endeavoring to wrest their wife's property from them and devote it to their own uses': Cooke v. Husbands, 11 Md. 505; Olivet v. Whitworth, 82 Md. 282. Separate estates were created in equity because married women could hold no other. As the husband at common law became the absolute owner of the wife's personal property and of the rents and profits of her real estate, during coverture, she was not liable for debts, or, to speak more accurately, she could not contract them. When, therefore, chancellors created an estate that she could hold and dispose of and which was liable for her debts, if contracted with reference to it, by going a step further and permitting restraints on alienation and anticipation they did not place the property in a worse position, so far as the debts of married women were concerned, than it was before the equitable separate estate was created. But, under our laws, a married woman may not only have an equitable separate estate, but by statute she may acquire property by purchase, gift, grant, devise, bequest, descent; in course of distribution, or, as amended in 1892, in any other manner, and, however obtained, it is protected from the debts of her husband. Such property she holds for her separate use, with power of devising as fully as if she were a feme sole, and she may convey it by joint deed with her husband. It is not necessary for her to have a trustee to secure her the sole and separate use of her property, but, if she desires it, she can appoint one by deed, her husband joining with her, or she can apply to a court of equity to have one appointed. The husband and wife may jointly charge her statutory separate property in the same way that she could charge her equitable separate estate, even by a parol contract, and courts of equity have the power to enforce the one as well as the other: Wingert v. Gordon, 6 Md. 106, and cases there cited. She may be sued at law on a note, bill of exchange, single bill, bond, contract, or agreement, executed jointly with her husband. Property earned by her skill, industry, or personal labor, as well as the income there-

Digitized by Google

nance and comfort which will elude or withstand the efforts of its creditors, whether such efforts are confined to ordinary proceedings under execution, or are aided by such powers of chancery as can be invoked by a creditor's bill.

Where statutes have not been enacted subjecting all equitable estates to execution, property may be with-

from, is held by her to her sole and separate use, with power as a feme sole to dispose of it, and it is liable for debts incurred by her about such business. In short, the tendency of our legislation is to greatly enlarge both her powers and liabilities, although it carefully protects her property from her husband and his creditors, so that now many of the reasons for decisions rendered in the past century, or the early part of the present one, can no longer have much force under our changed conditions. This particular question was not passed upon by this court when we still had the conditions to meet that originally influenced in the English courts, and as we are now called upon for the first time to decide it, at the time when the policy of the state is so radically different in its dealing with married women from what it formerly was, we do not feel called upon to be governed by reasons no longer applicable and make an exception in favor of married women, or those in contemplation of marriage, especially as it might result in creating a privileged class which would not reflect credit upon the law that created it nor the state that fostered it. Property is too easily transferred from husband to wife to permit her to do what he is prohibited from doing, because it is contrary to the policy of the law, calculated to tempt his honesty and to impose upon and deceive those dealing with him. If the wife is at the mercy of and under the absolute control of the husband, as seemed to be the moving cause of the English courts when they supported the validity of the prohibition against alienation in her favor, then he can with great facility make use of her to do what he himself cannot do, if we hold she can place such restraints on her property. He would only be required to convey the property to her and let her place such restraints on it as he desired, to make it impregnable against the assault of creditors, although he could not do it himself as long as the property was his own, because he was sui juris. Would not the result of such a decision be that a married man who wanted to have such restraints on his property could convey it to his wife and thus accomplish indirectly, through his wife, what he could not do directly?

Without meaning to say that the facts and reasoning are in all respects applicable, the Massachusetts and Pennsylvania cases are

Digitized by Google

drawn from execution at law by making it the subject of some active trust; but, in that event, it may be reached by a creditor's bill. The question we propose to consider is, What, if anything, will place property beyond the reach of the creditors of the beneficiary, whether proceeding at law or in equity? A direct devise or conveyance, with a provision forbidding alienation by the devisee or grantee, or declaring that the property shall not be subject to execution, cannot withdraw the property from execution, for the prohibition

more in accord with our views of the proper doctrine to establish as the law of this state on this question than the English cases are: See Pacific Nat. Bank v. Windran, 133 Mass. 175; Jackson v. Van Zedlitz, 136 Mass. 342; Ghormley v. Smith, 139 Pa. St. 584, 23 Am. St. Rep. 215, in which the courts of those states have passed on the general subject, as well as on the proposed exception in favor of married women. In the case of Reid v. Safe Deposit etc. Co., 86 Md. 464, this court, after referring to Brandon v. Robinson, 18 Ves. 434, Buckton v. Hay, L. R. 11 Ch. Div. 645, and Tullett v. Armstrong, 4 Mylne & C. 377, to show the views of the English courts, said: 'It thus appears that the exception in cases of devises and settlements upon married women was deemed necessary only because of the general rule that restraints upon alienation and anticipation were always regarded as repugnant to the estate. But in Maryland this is not the general rule.' And then after quoting from Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398, to show what the law is here, it was said: 'In this state, therefore, where the law is as just stated, it is difficult to perceive why trusts in cases of married women do not stand on the same footing as other trusts of the same nature.' Although this precise question was not involved in this case, we strongly intimated that we differed from the English decisions which applied a different rule in favor of trusts to married women from that applied to other trusts of the same nature, and we are of opinion that the rule which we have above laid down for persons who are sui juris is equally applicable to them. The income from the property in the hands of the trustee is therefore liable in equity to the payment of the debt due the appellant. We have not thought it necessary to advert to the fact that the deed was made when Mrs. Macgill was single, as it seems to have been practically conceded that it was made in contemplation of marriage, or that her husband departed this life after the debt was contracted and after this suit was brought."

Digitized by Google

does not operate to divest the debtor's estate and vest it in another, and while he retains the whole beneficial estate, it must carry with it the power to dispose of the property by transfer, whether voluntary or involuntary.[221] Later cases, however, are in apparent conflict with this rule. They indicate that in those states in which a trust may be created in favor of a beneficiary, and at the same time withdraw it from the reach of his creditors, it is not material in what form or language the intent of the creator of the trust be expressed, provided it sufficiently appear therefrom that the benefits of the trust shall not extend beyond the beneficiary, and hence shall not be subject to his assignees, whether voluntary or under execution against him.[222]

It is now clear that the property may be withdrawn from creditors by so limiting its possession and enjoyment that the estate or interest of the beneficiary or grantee will terminate on his becoming insolvent or bankrupt, or on an attempt being made to seize the estate for the benefit of his creditors.[223] Thus, where an annuity was given to the testator's nephew during his natural life, to be paid to him only and upon his receipt, and expressing an intent that the annuity should not be alienated, and, if alienated, that it should immediately cease and determine, and the nephew was adjudged a bankrupt, and his assignees in bankruptcy sought to recover the annuity, it was held that there

[221] Bridge v. Ward, 35 Wis. 687; Blackstone Bank v. Davis, 21 Pick. 42, 32 Am. Dec. 241.

[222] Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398; Partridge v. Cavender, 96 Mo. 452; Lampert v. Haydel, 96 Mo. 439, 9 Am. St. Rep. 358; Estate of Beck, 133 Pa. St. 51, 19 Am. St. Rep. 623.

[223] Joel v. Mills, 3 Kay & J. 458; Rochford v. Hackman, 9 Hare, 475; Stewart v. Brady, 3 Bush, 623; Bridge v. Ward, 35 Wis. 687.

Digitized by Google

could be no recovery, because by the alienation consequent upon the adjudication of bankruptcy the annuity had ceased.[224] A testator devised certain real estate to trustees, with power to dispose of the same, and, after paying certain charges out of the proceeds, to invest the residue, and of the income to be raised out of such investments one moiety was to be paid to his son and the other to his daughter; and the testator directed "that in case his son should, at any time or times, make any assignment, mortgage, or charge of or upon, or in any manner dispose of, by way of anticipation, the said interest, dividends, or accumulations, or any part thereof, or attempt or agree so to do, or commit any act whereby the same, or any part thereof, could or might, if the absolute property thereof were vested in him, be forfeited unto or become vested in any person, or persons, then in any of such cases the said trustees should henceforth pay and apply the said interest, dividends, and accumulations for the maintenance and support of his said son, and any wife or child, or children, he might have, and for the education of such issue, or any of them, as his trustees for the time being should, in their discretion, think fit." The son became a bankrupt. Whereupon a bill was filed by his assignee in bankruptcy for a decree to compel the trustees to pay them the moiety to which the son would have been entitled had the fiat in bankruptcy not issued against him. But the prayer of the bill was denied, on the ground that, after the commission of the act of bankruptcy, the son retained no interest in the property.[225]

[224] Dommett v. Bedford, 3 Ves. Jr. 149.
[225] Godden v. Crowhurst, 10 Sim. 642.

Digitized by Google

A will, wherein the testatrix devised her estate to trustees for the benefit of her sons, "contained a provision that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest, should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust fund was to be paid to the wife and children, or wife and child, as the case might be, of such son; and in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund." [226] This provision was sustained as against the claims of the assignee in bankruptcy of one of the sons.

If a settlement is made entitling one to a life interest in an annuity, with a clause of forfeiture if he shall enter into a composition with his creditors, or charge, assign, or in any manner, by way of contemplation, dispose of the annuity, the giving by him of written authority to trustees to pay the annuity to his bankers, as it should become due, who are to apply it in payment of his debt, forfeits his interest in the annuity.[227] A devise was made by a testator to his brother of certain land, "on condition that he never sells it out of the family." It was held that this condition was not void as being repugnant to the quality of the estate, nor as

[226] Nichols v. Eaton, 91 U. S. 718.
[227] Oldham v. Oldham, L. R. 3 Eq. 464.

Digitized by Google

taking away the power of alienation, for it left the devisee free to alienate to any member of the family.[228]

If property is conveyed or devised to trustees, who are vested with a discretion, in case they see fit, to apply the income or proceeds for the benefit or support of the beneficiary, he has no interest which can be reached by creditor's bill. As he had no power to compel the trustees to act for his benefit, his assignee or creditors can have none.[228a] It must, therefore, be conceded that property may be withdrawn from the reach of the creditors of the beneficiary by limiting his estate so that it will be terminated by his alienation voluntarily or involuntarily, or by vesting it in trustees who have a discretion to apply it for his benefit, or not. The vice of each of these methods is that it involves the beneficiary and his creditors in common ruin; for while it thwarts the efforts of the creditors, it leaves the intended beneficiary either without any estate or dependent on the caprice of the trustees. Hence, efforts have been made to devise other trusts under which the beneficiary may retain some absolute rights, notwithstanding his subsequent bankruptcy. These efforts have generally proved futile in England, but have met with encouraging success in the United States, as will more fully appear from a reference to the leading cases upon the subject. In the case of Brandon v. Robinson[228b] it appeared that Stephen Goom had devised and bequeathed his estate to trustees to sell, and to divide, or otherwise apply, the produce to the use of all his children living at his decease, in equal proportions, and he directed, with reference to the eventual interest

[228] In re Macleay, L. R. 20 Eq. 186.

[228a] Twopenny v. Peyton, 10 Sim. 487; Leavitt v. Beirne, 21 Conn. 1; Hall v. Williams, 120 Mass. 344; Davidson v. Kemper, 79 Ky. 5.

[228b] 18 Ves. Jr. 429.

Digitized by Google

of his son Thomas, that it should be laid out in public funds or securities, and that the dividends should be by the trustees, from time to time, paid to the son on his proper order and receipt, "subscribed with his own proper hand, to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments," and that, upon his decease, the principal of his share, with all accrued dividends, should be applied by the trustees to the benefit of such persons as, in course of administration, would be entitled to his personal estate. After the death of the testator the son became a bankrupt, and the surviving assignee, under the commission in bankruptcy, applied for the execution of the trust by the taking of an account and the payment to him of the son's interest. The Lord Chancellor Eldon sustained the bill of the assignee, saying: "There is no doubt that property may be given to a man until he shall become a bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents of a life estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. A like decision resulted from an annuity which trustees were directed to pay to the testator's son for life, the testator having declared with respect to such annuity that it was intended for the personal maintenance and support of the son during the whole of his life, and that it should not on any account be subject 'to the debts, engagements, charges, or encumbrances of him, my said son.'" [229] The case of Snow-

[229] Graves v. Dolphin, 1 Sim. 66.

Digitized by Google

den v. Dales [230] is an extreme one. An assignment was made to trustees of two mortgage sums aggregating two thousand pounds. Of this sum they were directed to hold eight hundred pounds in trust during the life of J. D. H., "or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, or at such other time or times, and in such sum or sums, portion or portions, as they should judge proper and expedient, to allow and pay the interest of the eight hundred pounds into the proper hands of the said J. D. H., or otherwise if they should think fit, in procuring for him diet, lodging, wearing apparel, and other necessaries; but so that he should not have any right, title, claim, or demand in or to such interest, other than the trustees should, in their or his absolute and uncontrolled power, discretion, and inclination, think proper, expedient, and so that no creditor of his should or might have any lien or claim thereon in any case, or the same be, in any way, subject or liable to his debts, dispositions, or engagements." The will further provided that in the event of the death of J. D. H., leaving a widow, the trustees should pay the interest to her, and after the decease of him or his widow, the eight hundred pounds, and all accumulations thereof, should be held in trust for the benefit of his children. It was held, as there was no provision made for the disposition of the fund to some other person than J. D. H. during his lifetime, that his interest therein vested in his assignee in bankruptcy.[231]

In several of the United States the English decisions upon this subject have been followed without hesita-

[230] 6 Sim. 525.

[231] See also Younghusband v. Gisborne, 1 Coll. C. C. 400; Page v. [illegible]y, 3 Beav. 20.

Digitized by Google

tion. Thus, in Smith v. Moore,[232] funds devised to T. H. S., in trust for W. G. S., "not subject to any debts he may have contracted, but for his comfort and support; and should he depart this life before receiving the same," then to be equally divided with testator's other children, were held to be subject to a bill filed by the creditors of the beneficiary. In the same state a testator devised property to T., in trust for M. and W., grandchildren of the testator, to manage the property and allow the beneficiaries, out of the profits, such sum annually as the trustee in his discretion thought right for their support, and the balance, if any, of the proceeds, to be invested by the trustee for the use of M. and W., and in no event should the principal sum be interfered with by any one, or parted with, or changed, except with the assent of the trustee, or by express direction of the chancery court. It was held that the interest of the beneficiaries in the corpus of the trust was, nevertheless, subject to execution, on the ground that "there cannot be a legal or equitable right in or to property, or to any rents, incomes, or property not so blended with the rights of others as to be incapable of separation and identification, that may not, by some appropriate remedy, in law or in equity, according to the nature of the case, be condemned to the satisfaction of debts. It is violative of public policy, and in fraud of the rights of creditors, to create a well-defined beneficial interest, legal or equitable, in property, real or personal, or in its rents, income, or profits, which can be enjoyed by an insolvent debtor free from liability for the payment of debts." [233]

[232] 87 Ala. 827.
[233] Taylor v. Harwell, 65 Ala. 1.

Digitized by Google

A like decision was pronounced in Georgia, where a devise had been made to a trustee of property, to be managed and controlled by him for the use and benefit of testator's son, who was restricted "in his expenses to the income arising from said property," and it was further provided in the will "that said property shall not be liable for the debts or contracts of testator's said son, except when made and entered into by the written consent of the trustee." [234] A decision in the same state, which does not purport to overrule, or even consider, the earlier ones, seems inconsistent with them. A testator provided that his executor should retain and manage, as trustee for the testator's widow, during her life, a certain portion of the estate, and, at her death, should divide it equally among her children, but in no case should her share be subject to the debts, liabilities, or contracts of her future husband. A judgment was recovered against her, and the judgment creditor sought to subject to its payment her interest under this trust. The judge in the trial court appointed a receiver, with directions to him to collect the widow's share of the rents and profits of certain real property, which was subject to the trust, and to apply them to the satisfaction of the complainant's debt. The supreme court reversed this decree. In so doing, it alluded to the fact that the widow was aged, infirm, and under an absolute necessity for the fund which had been left for her support, and said, "To set apart the income from this land, to pay this debt, would be virtually to set aside the will of her husband." [235] In saying this, the court seemed to have been moved by considerations which, in other courts,

[234] Gray v. Obear, 54 Ga. 231; Matthews v. Paradise, 74 Ga. 523.
[235] Barnett v. Montgomery, 79 Ga. 726.

Digitized by Google

have resulted in affirming the right of the creator of a trust to restrict it to the beneficiaries, and therefore to deny their creditors all benefit therein. In Ohio a testator devised to his son certain real property, to be used for his support and that of his family, the income, after providing for such support, to be used in the improvement of the premises. The testator gave his son power to sell the property for the purpose of investing the proceeds in other land, to be used for like purposes, and declared that it should not be sold for any debts of the son. It was held that any equitable right or estate existing in favor of the son merged in the legal estate, and that his interest was hence subject to execution.[236]

The states of California, North Carolina,[237] South Carolina,[238] Rhode Island,[239] are also committed to the English rule that a debtor cannot retain any beneficial interest beyond the reach of a creditor's bill. Unless it is limited over to some other beneficiary, the voluntary and involuntary disposition of it cannot be inhibited. Until recently, the supreme court of the United States entertained like views. Mr. Justice Swayne, delivering the opinion of that court in Nichols v. Levy,[240] thus tersely and lucidly expressed them: "It is a settled rule of law that the beneficial interest of the cestui que trust, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to

[236] Hobbs v. Smith, 15 Ohio St. 419.

[237] Kennedy v. Nunan, 52 Cal. 326; Mebane v. Mebane, 4 Ired. Eq. 131, 44 Am. Dec. 102; Pace v. Pace, 73 N. C. 119.

[238] Heath v. Bishop, 4 Rich. Eq. 46, 55 Am. Dec. 654.

[239] Tillinghast v. Bradford, 5 R. I. 205.

[240] 5 Wall. 441.

Digitized by Google

the beneficiary, and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go." But the views thus expressed were unnecessary to the decision of the case then before the court, and were not entertained by that great tribunal, when at a later day, and doubtless upon more mature consideration, it came to decide the case of Nicholls v. Eaton.[241] In that case, too, the opinion of the court upon this point was a dictum—but a dictum so forcibly expressed as to leave no doubt of the final dissent of that court from the decisions of the English courts upon this subject, and its adherence to the more liberal rules first pronounced by various state courts in different parts of the Union. Mr. Justice Miller delivered the opinion, in the course of which he said: "But while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts, upon the extremest doctrine of the English chancery court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property, may not be enjoyed by an individual, without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which

[241] 91 U. S. 725, followed in Hyde v. Woods, 94 U. S. 523.

Digitized by Google

the English chancery court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity, to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the states of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction. It is believed that every state in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different states. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces

Digitized by Google

the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the states. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by state laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held that as to contracts made thereafter the exemptions were valid. This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life estate, or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows that in creating a debt with such person he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded

Digitized by Google

when the object of the testator is carried out by excluding him from any benefit of such devise. Nor do we see any reason, in the recognized nature and tenure of property, and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

It remains for us to call attention to the American cases announcing and sustaining the rule to which the supreme court of the United States has yielded its weighty assent, as shown in the foregoing quotation. In the pioneer case upon this topic, a father directed his executors to purchase a tract of land, and to hold the same in trust for his son, and to permit the son to have the rents, issues, and profits thereof, but that the same should not be liable to any debts contracted, or which might be contracted, by the son, at whose death the land should vest in his heirs, but, if he should die without heirs, then in the heirs of the testator. The executors purchased a tract of land, and took a conveyance to themselves, subject to the trusts specified in the will. Afterward the life estate of the son was levied upon and sold. A conveyance was made pursuant to the sale, and the purchaser sought, in an action of ejectment, to recover possession of the property. His right of recovery was denied, on the broad

Digitized by Google

ground that "a man may, undoubtedly, so dispose of his land as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust estate, explicitly designating the uses, and defining the power of the trustees. Nor is such a provision contrary to law or any act of assembly. Creditors cannot complain, because they are bound to know the foundation upon which they extend their credit." [242] The principle of this case has been very frequently applied by the courts of the same state, Pennsylvania; but it appears to be essential, to bring a devise or bequest within the protection of the rule there maintained, that the testator in his will either prohibit the alienation or taking in execution of the beneficial interest,[243] or vest the trustees with a mere discretion to pay or to withhold the fund or its proceeds, as they may deem proper.[244]

In Kentucky, a testator devised his estate to trustees, the greater portion to be held for the benefit of his grandchildren, but the trustees were to pay to his son Robert, during the latter's life, the sum of twenty-

[242] Fisher v. Taylor, 2 Rawle, 33. This case has been repeatedly reaffirmed. Vaux v. Parke, 7 Watts & S. 25; Shankland's Appeal, 47 Pa. St. 113; Overman's Appeal, 88 Pa. St. 276; Thackara v. Mintzer, 100 Pa. St. 151; Chestnut St. N. B. v. Fidelity I. Co., 186 Pa. St. 333, 65 Am. St. Rep. 860, though it is certain in this state, as elsewhere, that one cannot create a trust in his own favor under which he may hold property, or income thereof, as against the claims of his creditors. Ghormley v. Smith, 139 Pa. St. 584, 23 Am. St. Rep. 215.

[243] Girard Life Ins. Co. v. Chambers, 46 Pa. St. 485, 86 Am. Dec. 513.

[244] Keyser v. Mitchell, 67 Pa. St. 473. A man's friends may raise a fund and place it in his control for the purpose of engaging in business, to enable him to support his family, and if he accepts such funds and makes a profit thereon, they are not subject to execution against him. Holdship v. Patterson, 7 Watts, 547.

Digitized by Google

five dollars per month for his support. An attempt, made by creditor's bill, to reach Robert's life estate proved futile, because the court construed the trust as giving Robert no absolute, assignable interest, but merely as imposing upon the trustees the duty of using the amount designated for his support, and because the principles of equity "do not subject the father's property to the debts of the son, nor give to the creditors of the son any right to complain that the father has not left or placed his property within their reach." [245] We know not how to reconcile this decision with a statute which has existed in the state wherein it was rendered since 1796, declaring that "estates of every kind, holden or possessed in trust, shall be subject to the like debts and charges of the persons to whose use, or for whose benefit, they were, or shall be, respectively holden or possessed, as they would have been subject to if those persons had owned a like interest in the things holden or possessed, as they own, or shall own, in the uses or proceeds thereof." The decisions in this state affirm, in general terms, that property cannot be vested in "trustees for the use of another without subjecting it to the debts of the cestui que trust." [246] Land was devised to one brother to be held in trust for another, to pay the latter annually such parts of the profits as in the discretion of the trustee should seem best. The interest of the beneficiary was, notwithstanding, decided to be subject to a creditor's suit against him.[247] A sister devised lands to be held in trust for her brothers to pay them an-

[245] Pope's Ex'rs v. Elliott, 8 B. Mon. 56.

[246] Johnson v. Ellis, 12 B. Mon. 479; Eastland v. Jordan, 3 Bibb, 186; Cosby v. Ferguson, 3 J. J. Marsh. 264.

[247] Marshall's Trustee v. Rash, 87 Ky. 116, 12 Am. St. Rep. 467.

Digitized by Google

nually or at shorter periods, at the discretion of the trustee, the rents and profits thereof, and declared the interest of the beneficiaries should in no manner be subject to their debts, and that if any attempt was made to subject the interest of either of the brothers to his debts, then that his share should be added to another fund provided for in the will. The will also gave the brothers power to dispose of the estates by their wills. In maintaining that the interest of the beneficiaries was subject to a creditors' suit, the court of appeals affirmed that it had "always subjected property held in trust to the payment of the debts of the cestui que trust, unless a discretionary power was given to the trustee to withhold all payment or benefit from him. In such a case there exists no ownership by the cestui que trust in the use of the property. He has no beneficial interest. The ownership is in the trustee, with the power to give or not, as he may please. There exists no claim which the cestui que trust can enforce against the trustee, and therefore no right exists in the debtor which the creditor may, by substitution, enforce."[248] The courts of this state appear to make a distinction between a trust which vests some equitable estate in favor of the beneficiary and a trust which merely provides that a sum shall, by trustees, be paid for his support or use, and, if the language of the creator of the trust does not forbid, they declare the latter to be discretionary, and hence not subject to execution.[249]

In Connecticut, a testator devised and bequeathed his estate to his sons and daughter, but inserted in the will the following condition: "All and every of the

[248] Bland v. Bland, 90 Ky. 400.
[249] Davidson v. Kemper, 79 Ky. 5.

Digitized by Google

property given to my daughter is for the exclusive benefit of her and her children, free from the debts and control of her husband; and to secure the same to their unimpaired enjoyment, I hereby give the same to my sons, George P. Beirne and Oliver Beirne, with full authority to apply the property as to them shall seem best, for their exclusive benefit, during the life of my said daughter, and, after her decease, to divide the same equally among her children." A bill was filed in chancery to compel the payment of a promissory note executed by the daughter out of moneys held by the sons as trustees under the will. The bill was dismissed, the majority of the court maintaining the right of a parent to place funds in the hands of trustees to be used for the benefit of a child, and not subject to alienation, whether voluntary or compulsory.[250]

[250] Leavitt v. Beirne, 21 Conn. 1; Easterly v. Keney, 36 Conn. 18. The clause in the will here involved was as follows: "I give and devise to my friend, Henry Keney, a three-fifths part of the brick house and lot next adjoining St. John's Hotel, to him and his heirs forever, in trust, however, for my nephew, Albert W. Goodwin of Wethersfield; and I do hereby order and direct said trustee to pay said Albert W., and this devise is for the purpose of securing to said Albert W. the rents, use, and benefits of said devise, exclusive of all other persons. Said trustee is hereby directed to pay to said Albert W., or to his written order, made annually, the rents, profits, and issues of said building hereby devised, and this devise is not to inure in any manner for the use and benefit of any creditors of said Albert W., but is hereby intended to be for the only use and benefit of said Albert W., and for such use and purpose only as he shall annually appoint." An execution was levied on the lands devised, and the levy was held inoperative. The court, however, was of the opinion that the beneficiary had a vested interest in the moneys in the hands of the trustee, and that such moneys were subject to attachment. The courts of this state have, therefore, proceeded, no further than to hold that where the trustees are vested with a discretion to pay or withhold the moneys, they will not control such discretion in the interest of creditors.

Digitized by Google

In Virginia, lands were devised to a trustee for the benefit of "Henrietta F. Handley, then the wife of Alexander W. Handley, and her family. The trustee was directed so to use and conduct the farm or plantation as to be most advantageous to the interests and support of said Henrietta F. and her children during the lifetime of said Henrietta." On a suit in equity being instituted to reach the interest of the wife and apply it to the satisfaction of her creditors, it was held that it was competent for the testatrix to provide a fund for the support of her daughter and the latter's children, and, the fund not being shown to be in excess of what was needed for such support, the bill must be dismissed.[251] In the same state, one Platoff Zane, on becoming possessed by inheritance of a vast estate, contracted in a little over a year liabilities exceeding fifty thousand dollars, and his friends, foreseeing that his extravagances and business incapacity would soon reduce him and his family to want, prevailed upon him to execute a deed of trust. By this deed all his property was conveyed to trustees, with ample powers to take possession thereof and to sell and dispose of the same, and out of the proceeds to pay all existing creditors of the grantor and the expenses of the trust. After these debts and expenses should be paid, the residue of the property was to be employed in purchasing a residence for Zane and his wife, and in making investments in bank stocks and other good securities. The income derived from the stocks and securities was to be applied to the support of Zane and wife during their lives and the life of the survivor, and at the death of the survivor was to go to their descendants and heirs. A bill in chancery was filed by a creditor,

[251] Nickell v. Handly, 10 Gratt. 336.

Digitized by Google

whose debt accrued subsequently to the date of the deed, whereby he sought to assail the deed as fraudulent, and to compel the trustees to pay such debt out of the trust property. The court determined that the deed, because it provided for all the existing debts of the grantor, could not be justly regarded as fraudulent, in the absence of any actual or express fraudulent intent on the part of the grantor, and that the interest reserved by the deed to the grantor, being merely a right to support and maintenance during life, was not subject to creditor's bill.[252]

A testator, after stating in his will that his brother was financially embarrassed, and it might be unsafe to devise property to him absolutely, set apart, in the hands of the executor in trust for the brother, certain lands and other property for the use of the brother under the superintendence of the executor, and declared that neither the estate nor the profits should be bound for any liability of the beneficiary, past or present, other than his decent, comfortable support. A circuit judge of the state decided, as to the profits, that they were the absolute property of the beneficiary, and hence subject to the demands of his creditors. This decision was reversed by the supreme court of appeals on the ground that the beneficiary had no absolute estate in the profits which he could assign, and that to apply them to any other purpose than his decent and comfortable support was a breach of the trust.[253]

A testator devised certain real estate upon the following trusts: "To keep said lands and tenements well rented; to make reasonable repairs upon the same; to

[252] Johnston v. Zane, 11 Gratt. 552.

[253] Garland v. Garland, 87 Va. 758, 24 Am. St. Rep. 682.

Digitized by Google

pay promptly all taxes and assessments thereon; to keep the buildings thereon reasonably insured against damages by fire; to pay over all remaining rents and income in cash into the hands of my said daughter, Juliet, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliet. At the death of the said Juliet, said trust estate shall cease and be determined, and the said lands shall vest in the heirs of the body of the said Juliet, and, in default of such heirs, shall descend to the heirs of my body then living, according to the laws of Illinois then in force regulating descents." After the will had been probated, and moneys had come into the hands of the trustees, to which the daughter, Juliet, was entitled, such funds were attempted to be attached by her creditors. The court conceded that upon an absolute conveyance or gift there could not be annexed conditions and limitations which would "defeat or annul the legal consequences of the estate transferred," but added: "But while this unquestionably is true, it does not necessarily follow that a father may not, by will or otherwise, make such reasonable disposition of his property, when not required to meet any duty or obligation of his own, as will effectually secure to his child a competent support for life; and the most appropriate, if not the only, way of accomplishing such an object is through the medium of a trust. Yet a trust, however carefully guarded otherwise, would, in many cases, fall far short of the object of its creation, if the father in such case has no power to provide against the schemes of designing persons, as well as the improvidence of the child itself. If the beneficiary may anticipate the income, or absolutely sell or otherwise dispose of the equitable interest, it is evident the

Digitized by Google

whole object of the settler is liable to be defeated. If, on the other hand, the author of the trust may say, as was done in this case, the net accumulations of the fund shall be paid only into the hands of the beneficiary, then it is clear the object of the trust can never be wholly defeated. Whatever the reverses of fortune may be, the child is provided for, and is effectually placed beyond the reach of unprincipled schemers and sharpers." [254]

In New York the question has been settled by statutes, which, in substance, exclude from proceedings in equity to reach beneficial interests all cases where the trust has been created by, or the fund held in trust has proceeded from, some person other than the debtor,[255] except that a creditor is permitted to reach any portion of a trust fund "beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created." [256] It is no objection to the validity of a devise under these statutes that the beneficiary is also one of the trustees of the fund, if there are other trustees competent to act, and the in-

[254] Steib v. Whitehead, 111 Ill. 249. Like reasoning prevailed in Wallace v. Campbell, 53 Tex. 229; White v. White, 30 Vt. 338; Arnwine v. Carroll, 4 Halst. Ch. 620; Wales v. Bowdish, 61 Vt. 23; Husted v. Stone, 69 Vt. 149; Emerson v. Marks, 24 Ill. App. 642.

[255] Campbell v. Foster, 35 N. Y. 366; Bramhall v. Ferris, 14 N. Y. 41, 67 Am. Dec. 113.

[256] Wetmore v. Wetmore, 149 N. Y. 520, 52 Am. St. Rep. 752; Williams v. Thorn, 70 N. Y. 270; Sillick v. Mason, 2 Barb. Ch. 79; Graff v. Bonnett, 31 N. Y. 9, 88 Am. Dec. 236. In Hallett v. Thompson, 5 Paige, 583, Chancellor Walworth showed an inclination to follow the English chancery decisions, and to hold that "an attempt to give to the legatee an absolute and uncontrollable interest in personal estate, and at the same time to prevent its being subject to the usual incidents of such an absolute right to property, so far as the rights of creditors are concerned," must be thwarted in a court of chancery. See also Clute v. Bool, 8 Paige, 82; Degraw v. Clason, 11 Paige, 136.

Digitized by Google

come of the fund cannot be applied to the use of the beneficiary without the concurrence of the other trustees.[257]

In Tennessee, when the question was first presented, its courts adopted what we have shown to be the English rule upon the subject, denying the right to create a trust in favor of a beneficiary, and at the same time withdraw his interest from the reach of his creditors.[258] Soon afterward the question was re-examined, and the earlier decisions overruled, and the views expressed by the supreme court of the United States approved as the rule of decision in the state court.[259] In Missouri, too, the first decision was understood to affirm the English rule.[260] More recently the right to create a trust and to exempt the interest of a beneficiary from execution was affirmed,[260a] subject to the limitation that the interest of a beneficiary must be held to be within the reach of his creditors, if, in order to become entitled to the benefits of the trust in his favor, he was compelled to pay something, and his relation to it thus made that of a purchaser.[260b]

A wife devised and bequeathed her property to a trustee, to hold for the sole use and support of her husband, with power to sell or exchange the property and to reinvest the proceeds. The trustee was required to exact the written receipt or assent of the husband in every instance in which he paid moneys to him or sold

[257] Wetmore v. Truslow, 51 N. Y. 338.

[258] Turley v. Massengill, 7 Lea, 353; Hooberry v. Harding, 10 Lea, 392.

[259] Hooberry v. Harding, 3 Tenn. Ch. 677; Jourolman v. Massengill, 86 Tenn. 81.

[260] McIlvaine v. Smith, 42 Mo. 45, 97 Am. Dec. 295.

[260a] Lampert v. Haydel, 96 Mo. 439, 9 Am. St. Rep. 358; Partridge v. Cavender, 96 Mo. 452.

[260b] Bank of Commerce v. Chambers, 96 Mo. 459.

Digitized by Google

or exchanged property, and was directed to convey any part of the testator's estate "to such associations, person, or persons as her husband might designate by written authority." The interest of the husband was adjudged to be clearly subject to a bill filed by his creditors, for the following reasons: "No other person is named in the will as a cestui que trust, either during the life of the husband or after his death; no accumulation of income is provided for or contemplated; nor is any disposition made of the remainder after his death in case of his not exercising the power conferred on him; and no restrictions whatever are imposed by the will or committed to the discretion of the trustee as to the amount of principal or income that the husband may receive, or the uses to which he may apply them."[261] There is, nevertheless, no doubt in this state that the donor of a trust may so restrict it that it cannot be assigned by the beneficiary, and that the interest of the latter therein shall not be subject to his creditors, and that the intent of the donor to do this need not be expressed in any set terms, but may be inferred from his general purpose as disclosed in his will or other instrument creating the trust.[262] These rules are equally applicable in Iowa, Maine, and Maryland.[263]

§ 190. **Mortgagor's Estate.**—A mortgage at common law operated as a conveyance of the legal title, and left the mortgagor, whether he continued in pos-

[261] Sparhawk v. Cloon, 125 Mass. 267.

[262] Broadway N. B. v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Slattery v. Wason, 151 Mass. 266, 21 Am. St. Rep. 448.

[263] Meek v. Briggs, 87 Ia. 610, 43 Am. St. Rep. 410; Roberts v. Stevens, 84 Me. 325; Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398; Reid v. Safe D. & T. Co., 86 Md. 464.

Digitized by Google

session or not, the owner of a mere equity. The legal title of the mortgagee was defeasible, and upon payment of the mortgage debt was extinguished; or, more properly speaking, the conveyance embraced within the terms of the mortgage became null and void upon the satisfaction of the debt due the mortgagee. But, during the continuance of the mortgage, it is clear, upon common-law principles, that the mortgagor, as he was possessed of a mere equity, had no estate subject to execution. Nor was the statute of 29 Charles II, authorizing the interests of certain classes of cestuis que trust to be taken under an elegit, at all applicable to mortgagors. In fact, it is clear that that statute could not reach any case in which the holder of the legal title had any beneficial interest therein. It operated only in those cases where the cestui que trust had the whole beneficial interest, with the right to insist upon an immediate conveyance to him of the legal estate. As neither the common law nor this statute extended to equities of redemption, it was clear that upon legal principles a mortgagor's estate was not subject to execution. These legal principles were acquiesced in in England, and in some portions of the United States.[264] But in equity the mortgage was treated according to the real intention of the parties. It was held to be a mere security for the payment of money, and all the rights of the mortgagor were carefully pro-

[264] Van Ness v. Hyatt, 13 Pet. 294; Combs v. Young, 4 Yerg. 218, 26 Am. Dec. 225; Cantzon v. Dorr, 27 Miss. 246; Boarman v. Catlett, 13 Smedes & M. 149; Thornhill v. Gilmer, 4 Smedes & M. 153; Henry v. Fullerton, 13 Smedes & M. 631; Marlow v. Johnson, 31 Miss. 128; Allison v. Gregory, 1 Murph. 333; Hill v. Smith, 2 McLean, 446; Watson on Sheriffs, 209; Plunket v. Penson, 2 Atk. 290; Scott v. Scholey, 8 East, 467, 486; Lyster v. Dolland, 1 Ves. Jr. 431; 4 Bro. C. C. 478; Wolf v. Doe, 13 S. & M. 103, 51 Am. Dec. 147.

Digitized by Google

tected. By the usual terms of mortgages, the mortgagor was to continue in the possession and in the enjoyment of his lands until after default was made in the payment of the debt. He was not allowed to commit waste, nor otherwise to depreciate the value of the mortgagee's security; but, in other respects, he was regarded as the owner of the property. His equity of redemption could be aliened, entailed, mortgaged, and devised. In the United States, the fact that the mortgagor was, for so many purposes, entitled to all the advantages of unconditional ownership has had its influence in determining his legal status. Except as between himself and his mortgagee, he came to be regarded, even in law, as the owner of the property. Hence, in the vast majority of the states, his equity of redemption, or, in other words, all his rights under the mortgage, may, at law, be taken and sold or extended under an execution against him.[265] In Mississippi,

[265] Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52; Kelly v. Longshore, 78 Ala. 203; Baker v. Clepper, 26 Tex. 629, 84 Am. Dec. 591; De la Vega v. League, 64 Tex. 205; Kelly v. Burnham, 9 N. H. 20; Camp v. Coxe, 1 Dev. & B. 52; Crooker v. Frazier, 52 Me. 405; Wootton v. Wheeler, 22 Tex. 338; Punderson v. Brown, 1 Day, 93, 2 Am. Dec. 53; Franklin v. Gorham, 2 Day, 142, 2 Am. Dec. 86; Harwell v. Fitts, 20 Ga. 723; Commissioners v. Hart, 1 Brev. 492; Allyn v. Burbank, 9 Conn. 151; Fitch v. Pinckard, 4 Scam. 69; State v. Laval, 4 McCord, 336; Halsey v. Martin, 22 Cal. 605; Finley v. Thayer, 42 Ill. 350; Foster v. Potter, 37 Mo. 525; Watkins v. Gregory, 6 Blackf. 113; Dougherty v. Linthicum, 8 Dana, 198; McIsaacs v. Hobbs, 8 Dana, 268; Cushing v. Hurd, 4 Pick. 253, 16 Am. Dec. 335; Reed v. Bigelow, 5 Pick. 280; Washburn v. Goodwin, 17 Pick. 137; Johnson v. Stevens, 7 Cush. 431; Waters v. Stewart, 1 Caines Cas. 47; Phelps v. Butler, 2 Ohio, 224; Farmers' Bank v. Commercial Bank, 10 Ohio, 71; Asay v. Hoover, 5 Pa. St. 35, 45 Am. Dec. 713; Tiffany v. Kent, 2 Gratt. 231; Phyfe v. Riley, 15 Wend. 248; Taylor v. Cornelius, 60 Pa. St. 187; Stewart v. Crosby, 50 Me. 130; Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623; Helmberger v. Boyd, 18 Ind. 420; Beers v. Bottsford, 13 Conn. 146; Dunbar v. Starkey, 19 N. H. 160; Livermore v. Boutelle, 11 Gray, 217, 71 Am.

Digitized by Google

while the common-law rule was still in force, a mortgagor's interest might have been sold under execution when the mortgage was given to secure a contingent liability, and reserved the right to continue in possession;[266] also when the mortgage debt had been paid, but satisfaction had not been entered.[267]

In 1857, an amendment to the statutes of this state declared that, before a sale under a mortgage or deed of trust, the mortgagor should be deemed the owner of the legal title to the property conveyed in such mortgage or deed of trust, except as against the mortgagee or trustee after a breach of the condition of such mortgage or deed. Since that time the interests of mortgagors have been subject to execution, except upon judgments at law for the mortgage debt.[268]

There may be instances in which a sale of the mortgagor's interest tends to impair the mortgage debt or lessen the mortgagee's security, and where the retention of title by the mortgagor must assist him to discharge the condition of the mortgage. Thus, one who had entered into a valid agreement to support another for the term of the latter's life executed a mortgage of real property as security for the performance of this obligation. This property was subsequently levied upon by a creditor of the mortgagor, and sold under execution, and proceedings were commenced to recover possession. The defendant sought to defeat this by interposing the claim that his equity of redemption was

Dec. 708; Hulett v. Soullard, 26 Vt. 295; Capen v. Doty, 13 Allen, 262; Cowles v. Dickinson, 140 Mass. 373; Byrd v. Clarke, 52 Miss. 623; Gassenheimer v. Molton, 80 Ala. 521; Seaman v. Hax, 14 Colo. 536.

[266] Huntington v. Cotton, 31 Miss. 253.

[267] Wolfe v. Dowell, 13 Smedes & M. 103.

[268] Carpenter v. Bowen, 42 Miss. 28; Davis v. Hamilton, 50 Miss. 213.

Digitized by Google

of such a character that it could not be attached or sold under execution, because the mortgagee was entitled to his personal care, and neither by a voluntary nor an involuntary transfer of the land could the duty of performing the condition of the mortgage be cast upon another. The court held that the mortgagor retained an interest subject to execution, and that the purchaser at an execution sale acquired the title subject to its being divested by the foreclosure of the mortgage if the condition thereof should not be performed.[269]

Trust deeds made to secure the payment of indebtedness, and giving the trustee power to sell in the event of default, have substantially the same effect as mortgages with powers of sale, and the interest or estate remaining in the person making the deed is subject to execution at law.[270]

The right to sell a mortgagor's equity of redemption under execution exists in favor of the mortgagee, as well as of other creditors, provided the sale is not in satisfaction of the same indebtedness to secure the payment of which the mortgage was given. Such a sale is valid, and does not transfer the interest of the judgment creditor under his mortgage. He may afterward foreclose it, unless there are special circumstances estopping him from asserting his mortgage. If it was of record, or the purchaser at the execution sale had actual notice of it, the mortgagee is not, by such sale, precluded from afterward foreclosing his mortgage.[271]

[269] Bodwell G. Co. v. Lane, 83 Me. 168.

[270] Turner v. Watkins, 31 Ark. 429. Contra, Thompson v. Thornton, 21 Ala. 808; Morris v. Way, 16 Oh. 469; Lipe v. Mitchett, 2 Yerg. 400.

[271] Gassenheimer v. Molton, 80 Ala. 521; Seaman v. Hax, 14 Colo.

Digitized by Google

In New Jersey the mortgagor has no estate subject to execution after the mortgagee has entered for condition broken.[272] The rule is otherwise in New York, and the mortgagor's equity of redemption may be levied upon until after it has been foreclosed.[273]

§ 191. The Sale of the Mortgagor's Equity of Redemption, under a judgment at law for the mortgage debt, has always been regarded with disfavor. In some states it has been forbidden by statute,[274] and, when made, has been declared void.[275] Independent of statutory considerations, it has generally been declared inoperative; or, if allowed any effect, has been so restricted and confined as to prevent its operation from working injustice to the mortgagor.[276] It seems to be conceded that the mortgagee may sue at law for his debt. By so doing, he elects to pursue other property than that mortgaged to him. He will not be allowed to sell the equity of redemption, and at the same time to retain his title under the mortgage. His attempt to do so is always regarded as oppressive. "The true and only remedy for all this mischief is to prevent

536; Walters v. Defenbaugh, 90 Ill. 241; Cushing v. Hurd, 4 Pick. 253, 16 Am. Dec. 335.

[272] Ketchum v. Johnson, 3 Green Ch. 370.

[273] Trimm v. Marsh, 3 Lans. 509.

[274] Gale v. Hammond, 45 Mich. 147; Preston v. Ryan, 45 Mich. 174; Linville v. Bell, 47 Ind. 547; Mitchell v. Ringle, 151 Ind. 16, 68 Am. St. Rep. 212.

[275] Delaplaine v. Hitchcock, 6 Hill, 14.

[276] Greenwich Bank v. Loomis, 2 Sandf. Ch. 70; Atkins v. Sawyer, 1 Pick. 351, 11 Am. Dec. 188; Camp v. Coxe, 1 Dev. & B. 52; Simpson v. Simpson, 93 N. C. 373; Deaver v. Parker, 2 Ired. Eq. 40; Washburn v. Goodwin, 17 Pick. 137; Trimm v. Marsh, 3 Lans. 509; Waller v. Tate, 4 B. Mon. 529; Powell v. Williams, 14 Ala. 476, 48 Am. Dec. 105; Barker v. Bell, 37 Ala. 358; Baldwin v. Jenkins, 23 Miss. 206; Bronston v. Robinson, 4 B. Mon. 142; Goring v. Shreve, 7 Dana, 64; Bonnell v. Henry, 13 How. Pr. 142; Loomis v. Stuyvesant, 10 Paige, 490; Thompson v. Parker, 2 Jones Eq. 475; Buck v. Sherman, 2

Digitized by Google

such sales; and I think I shall be inclined, if the case should arise hereafter, to prohibit the mortgagee from proceeding at law to sell the equity of redemption. He ought, in every case, to be put to his election to proceed directly on the mortgage, or else to seek other property, or the person of the debtor, to obtain satisfaction for his debt. I see no other way to prevent a sacrifice of the interest of the mortgagor; and it is manifestly equitable that the mortgagee be compelled to deal with his security, so as not to work injustice." [277] The courts are by no means unanimous in their judgments respecting the effect of the sale of mortgaged premises under a judgment at law for the mortgage debt. If the levy and sale are to be regarded as operating only upon the equity of redemption, to sustain and enforce them would create great confusion and injustice. In that event, the sale would be subject to the very claim or debt for the satisfaction of which it is made, and the right of redemption might sell for a sum sufficient to pay the debt while the mortgage would remain in apparent force. If the interest of the mortgagee be regarded as a mere lien, he may, unless prohibited by statute, waive it. His recovering judgment at law for the mortgage debt, and levying upon and selling the mortgaged premises, may with great propriety be construed as an irrevocable election to waive the lien. Where this construction prevails, a sale of such premises may properly be allowed, by giving it effect as a transfer of the interest both of the mortgagor and the mortgagee.[278] The decisions here

Doug. (Mich.) 176; Thornton v. Pigg, 24 Mo. 249; Lesley v. Shock, 3 Houst. (Del.) 130; Preston v. Ryan, 45 Mich. 174.

[277] Tice v. Annin, 2 Johns. Ch. 130.

[278] Coggswell v. Warren, 1 Curt. 223; Porter v. King, 1 Greenl. 297; Crooker v. Frazier, 52 Me. 405; Forsyth v. Rowell, 59 Me. 131;

Digitized by Google

cited give substantially the same effect to a judgment at law for a mortgage debt followed by an execution sale thereon of the mortgaged premises as is given to a sale under a decree of foreclosure. The purchaser at the sale takes the title to the property free of the title of the mortgagee, or the lien of his mortgage. In other jurisdictions the sale of the property under an execution at law for the mortgage debt has been held ineffective, or, more accurately speaking, the mortgagor has, notwithstanding such sale, the right to redeem the property and to maintain a suit to enforce such right, if it is not voluntarily conceded.[279] In some of the states an injunction will issue at the instance of a mortgagor to prevent the sale of the mortgaged premises under an execution at law for the mortgage debt.[280] If, however a sale has been made without objection, and has realized a sum not sufficient to satisfy the mortgage debt, it is said that it does not extinguish it, except as to the amount actually received, and hence that the mortgagee may proceed to levy upon and sell other property until full satisfaction is thereby produced.[281] In a more recent opinion it was said that a sale under execution, though upon a judgment at law, for the mortgage debt, is deemed subject to the mortgage, or, in other words, is of the equity of re-

Youse v. McCreary, 2 Blackf. 243; Fosdick v. Risk, 15 Ohio, 84. 45 Am. Dec. 562; Hollister v. Dillon, 4 Ohio St. 197; Fithian v. Corwin, 17 Ohio St. 118; Pierce v. Potter, 7 Watts, 475; Cottingham v. Springer, 88 Ill. 90; Sharts v. Awalt, 73 Ind. 304; Lord v. Crowell, 75 Me. 399; Lydecker v. Bogert, 38 N. J. Eq. 136; McLure v. Wheeler, 6 Rich. Eq. 343.

[279] Boswell v. Carlisle, 55 Ala. 554; Powell v. Williams, 14 Ala. 476, 48 Am. Dec. 105; Young v. Ruth, 55 Mo. 515; Lumley v. Robinson, 26 Mo. 364; Simpson v. Simpson, 93 N. C. 373.

[280] Severns v. Woolston, 3 Green Ch. 220; Van Meter v. Conover, 18 N. J. Eq. 38; Tice v. Annin, 2 Johns. Ch. 125.

[281] Deare v. Carr, 3 N. J. Eq. 513; Pierce v. Potter, 7 Watts, 475.

Digitized by Google

demption only, and whether the sale is to the mortgagee or to a stranger, it is presumed that the bid made is for the property over and above the mortgage; that if the sale is made expressly not subject to the mortgage, the mortgage debt is extinguished; and, where it is not so subject, the mortgagor may restrain the mortgagee "from proceeding to sell other property until he shall have done what equity requires, which will be to credit on his debt what he ought to credit in view of his purchase of the property under the circumstances." [282] But in those states where the mortgagee is not allowed to levy upon and sell the mortgaged premises under a judgment at law for the mortgage debt, the prohibition is not applicable, when, after the execution of the mortgage, the mortgagor has executed a second mortgage, including the mortgaged premises and other real property. In that event, the first mortgagee may, upon execution, have his debt levied upon the equity of redemption of the mortgagor in both parcels. This is because, upon the making of the first mortgage, the mortgagee had a right, upon a judgment for the mortgage debt, to levy upon any property of the mortgagee not included in the first mortgage, and of this right the mortgagee could not be deprived by the execution of a second mortgage. Especially is this true where, by the law of the state, if a mortgage exists against two or more parcels of real property, there is no procedure "by which the equity of redeeming one of the parcels only can be sold." [283]

A mortgagee may levy upon and sell the mortgaged premises upon an execution for a debt distinct from

[282] Lydecker v. Bogert, 88 N. J. Eq. 186.
[283] Johnson v. Stevens, 7 Cush. 431.

Digitized by Google

that secured by the mortgage.[284] A mortgage may be made to secure two or more negotiable notes. In this event, the indorsee of any of these notes may bring an action at law thereon against the mortgagor, and may sell his equity of redemption in satisfaction of the judgment.[285] If, however, the mortgagee assigns the mortgage to the indorsee of the note, he becomes substituted to the disability of the mortgagee, and cannot sell the equity of redemption under a judgment at law for a part of the mortgage debt.[286] A mortgagee may, in Massachusetts, sell, under a judgment for his debt, the mortgagor's equity of redemption in a second or junior mortgage.[287] In Oregon, the levy upon and sale of the mortgaged premises under a judgment at law for the mortgaged debt are not void.[288] Whether such sale is voidable by some motion or proceeding taken in the interest of the mortgagor was not determined.

§ 192. Interest of Grantor and Grantee of a Deed Intended as a Mortgage.—There are various conveyances which, though not mortgages in form, are nevertheless designed to accomplish the same purpose. The question arises, whether the grantor in such a conveyance retains an interest subject to execution, in those states where, though equitable titles are exempt, the interests of mortgagors are liable to execution. In Ohio and Alabama it has been held that the grantor in a deed of trust has no estate vendible under an execution at

284 Cushing v. Hurd, 4 Pick. 253, 16 Am. Dec. 335.

285 Crane v. March, 4 Pick. 131, 16 Am. Dec. 329; Andrews v. Fiske, 101 Mass. 422.

286 Washburn v. Goodwin, 17 Pick. 137.

287 Johnson v. Stevens, 7 Cush. 431.

288 Matthews v. Eddy, 4 Or. 225.

Digitized by Google

law.[289] So in Ohio and Georgia, if a deed absolute on its face is given and accepted as a mortgage, the grantor's interest cannot be levied upon at law.[290] In the latter state provision has recently been made for levying upon the interest of the grantee in such a deed in a manner which will hereinafter be stated.[291]

The interest of a mortgagee is, as we have hereinbefore shown, not subject to execution as real property. Upon principle the same rule must apply to the grantee of a conveyance made and accepted as security for a debt. The supreme court of Georgia, however, nevertheless determined that the interest of such a grantee was like that of the vendor of property who has not conveyed it, and is under no obligation to do so until paid the balance remaining due on the purchase price; and, hence, that the interest of such a grantee is subject to execution, the purchaser at the sale, if charged with notice of the purpose of the conveyance, taking the right to hold the title until paid the debt.[292] But the more reasonable rule under such circumstances is, that the creditors of the parties are not entitled to treat their relation as other than that of mortgagor and mortgagee; and, therefore, that they may levy an execution against the former, and not against the latter.[293]

[289] Morris v. Way, 16 Ohio, 469; Thompson v. Thornton, 21 Ala. 808; Lipe v. Mitchell, 2 Yerg. 400.

[290] Baird v. Kirtland, 8 Ohio, 21; Loring v. Melendy, 11 Ohio. 355; Phinizy v. Clark, 62 Ga. 623; Groves v. Williams, 69 Ga. 614; McCalla v. American etc. M. Co., 90 Ga. 113.

[291] Post, § 194.

[292] Parrott v. Baker, 82 Ga. 364.

[293] Fredericks v. Corcoran, 100 Pa. St. 413; Clark v. Watson. 141 Mass. 248; Newhall v. Burt, 7 Pick. 156; Second Ward Bank v. Upmann, 12 Wis. 499.

Digitized by Google

§ 193. A Purchaser at an Execution Sale "obtains an inchoate right, which may be enlarged into a perfect title, without any further act than the execution of a deed, in pursuance of a sale already made. It is not a mere right to have a certain sum charged upon the property satisfied out of it. The sum before charged upon the land has already been satisfied by the sale to the extent of the amount bid by the purchaser. The purchaser has already bought the land and paid for it. The sale is simply a conditional one, which may be defeated by the payment of a certain sum, by certain designated parties, within a certain limited time. If not paid within the time, the right to a conveyance becomes absolute, without any further sale, or other act to be performed by anybody. The purchaser acquires an equitable estate in the lands, conditioned, it is true, but which may become absolute by simple lapse of time, without the performance of the only condition which can defeat the purchase. The legal title remains in the judgment debtor, with the further right in him, and his creditors having subsequent liens to defeat the operation of a sale already made during a period of six months; after which, the equitable estate acquired by the purchaser becomes absolute and indefeasible, and the mere dry, naked, legal title remains in the judgment debtor, with authority in the sheriff to divest it, by executing a deed to the purchaser."[294] Because, by a sale under execution, the purchaser acquires, even before the expiration of the time for redemption, an inchoate, inceptive title to the lands sold, and because the sheriff's deed, when made, takes effect by relation as of the day of the sale, the purchaser's

[294] Page v. Rogers, 31 Cal. 301.

Digitized by Google

title has, in California, New York, and Pennsylvania, been held to be subject to execution.[295] So it is said that the estate of a tenant by elegit is subject to execution in England.[296] But in Illinois, Maine, Ohio, and New Jersey, one who derives title under an execution has no interest subject to levy until the time for redemption has expired, although, in the first-named state, he has by law a perfect legal title, and not a mere equity—this legal title being defeasible on payment of the sum required to make redemption.[297]

§ 194. The Interest Held under a Contract to purchase, with an agreement for a conveyance when the terms of the sale have been complied with, is, of course, a mere equity, and upon common-law principles is not subject to execution. Prior to the statute of 29 Charles II., it would have been immaterial to inquire whether the vendee had fully complied with the terms of his agreement, and become entitled to a conveyance, or not; for, as long as the legal title remained in the vendor, there was no interest in the vendee subject to execution. Under the construction given to this and to similar statutes, the vendee who had made full payment, and was entitled to an immediate conveyance, was regarded as a cestui que trust, for whom and to whose use the vendor was seized. Hence, the interest of such vendee was held to be liable to levy and sale at law.[298] The same rule has been maintained where the

[295] Page v. Rogers, 31 Cal. 301; Wright v. Douglass, 2 N. Y. 373; Slater's Appeal, 28 Pa. St. 169; Morrison v. Wurtz, 7 Watts, 437; Whiting v. Butler, 29 Mich. 129.

[296] Watson on Sheriffs, 208.

[297] Den v. Steelman, 5 Halst. 193; Gorrell v. Kelsey, 40 Ohio St. 117; Kidder v. Orcutt, 40 Me. 589; Bowman v. People, 82 Ill. 246, 25 Am. Rep. 316.

[298] Morgan v. Bouse, 53 Mo. 219; Thompson v. Wheatley, 5 Smedes

Digitized by Google

purchase-money, though tendered by the vendee, had been refused by the vendor.[299] But in some of the states the vendee's interest has been held to be exempt from execution until the conveyance was made to him. This was so for a long time in Alabama,[300] and until the adoption of the code now in force in that state. In Indiana, the interest of the vendee is not subject to direct levy and sale until, by conveyance, he has become vested with legal title;[301] but it may be reached by certain statutory proceedings in aid of the execution.[302] In Tennessee, interests of this character are not subject to execution at law,[303] but under the code of that state judgments or decrees may be made to bind an equitable interest of a judgment debtor in real property by filing within sixty days after its rendition a memorandum thereof in the register's office of the county wherein the realty is situated, and by filing a bill in equity within thirty days after the return of the execution unsatisfied, for the purpose of subjecting such equity to the satisfaction of the complainant's judgment or decree.[304]

In cases where a contract of sale has been made, and only a portion of the purchase-money has been paid, the vendee has an interest which will be recognized

& M. 499; Moody v. Farr, 6 Smedes & M. 100; Frost v. Reynolds, 4 Ired. Eq. 494; Pitts v. Bullard, 3 Kelly, 5, 46 Am. Dec. 405; Neef v. Seely, 49 Mo. 209; Phillips v. Davis, 69 N. C. 117.

[299] Anthony v. Rogers, 17 Mo. 394.

[300] Hogan v. Smith, 16 Ala. 600; Collins v. Robinson, 33 Ala. 91; Fawcetts v. Kimmey, 33 Ala. 261.

[301] Modisett v. Johnson, 2 Blackf. 431; Gentry v. Allison, 20 Ind. 481.

[302] Figg v. Snook, 9 Ind. 202.

[303] Hillman v. Werner, 9 Heisk. 586; Blackburn v. Clark, 85 Tenn. 506.

[304] Code Tenn., ed. 1884, §§ 3698, 3700.

Digitized by Google

and amply protected in equity. He is not, however, such a cestui que trust as is referred to in the statute of 29 Charles II., nor in similar statutes. He has no right to call for an immediate conveyance. He is not entitled to the legal estate; nor is it certain that he will ever be so entitled. The vendor has still a beneficial interest in the legal estate. It is true that the vendee's estate or interest may be of great value, and that it ought, as a matter of public policy and of common honesty, to be available as assets for the benefit of his creditors. But it is clear that the case is not one of a simple, unmixed trust, and, therefore, that the vendee's interest cannot be taken in execution, by virtue of the common law, nor of the statutes heretofore referred to.[305] The interest of the vendee may be transferred voluntarily. Hence, it has been held that a sale thereof under execution, made at his request, is valid.[306] In several of the states, the interest of a vendee, after part payment has been made, is by statute subject to execution. The purchaser at the sheriff's sale becomes entitled to all the benefits of the contract of sale on complying with all its conditions.[307]

[305] Bogert v. Perry, 17 Johns. 351, 8 Am. Dec. 411; Goodwin v. Anderson, 5 Smedes & M. 730; Ledbetter v. Anderson, Phill. Eq. 323; Harmon v. James, 7 Smedes & M. 111; Brunson v. Grant, 48 Ga. 394; Ellis v. Ward, 7 Smedes & M. 651; Frost v. Reynolds, 4 Ired. Eq. 494; Delafield v. Anderson, 7 Smedes & M. 630; Badham v. Cox, 11 Ired. 456; Moore v. Simpson, 3 Met. (Ky.) 349; Hinsdale v. Thornton, 75 N. C. 381; Sweeney v. Pratt, 70 Conn. 274. In Ohio an interest held under a bond for title, without possession, is not subject to execution. Haynes v. Baker, 5 Ohio St. 253.

[306] Moore v. Simpson, 3 Met. (Ky.) 349.

[307] Nickles v. Haskins, 15 Ala. 619, 50 Am. Dec. 154; Fish v. Fowlie, 58 Cal. 373; Estes v. Ivey, 53 Ga. 52; Young v. Mitchell, 33 Ark. 222; Rosenfeld v. Chada, 12 Neb. 25; Brant v. Robertson, 16 Mo. 129; Lumley v. Robinson, 26 Mo. 364; Stevens v. Legrow, 19 Me. 95; Jameson v. Head, 14 Me. 34; Woods v. Scott, 14 Vt. 518; Houston

Digitized by Google

This must necessarily be so in all those states which have by statute made equitable interests in real property subject to execution. The right to acquire the title to real property, existing under an enforceable contract, especially if followed by the payment of some part of the purchase price or the taking of possession in pursuance of the contract, is an equitable interest, and subject to execution to the same extent as other equitable interests.[308]

The code of Georgia has recently made specific provision for subjecting to execution real property held under contracts of purchase or for which conveyances have been made to secure an indebtedness due to the grantee. If a judgment is rendered for such indebtedness, or for the balance remaining unpaid of the purchase price, it is the duty of the holder of the legal title, without any order of court, to execute to the defendant in execution a conveyance of the property, and thereupon a levy may be made thereon in satisfaction of the judgment. If the judgment is in favor of a person other than the vendor, or one to whom a debt is due which has been secured by a deed absolute in form, but intended to operate as a mortgage, the judgment creditor is entitled to pay off the amount due on the property and to have a conveyance then made to the defendant in execution, after which the property may be levied upon and sold. The proceeds of the sale must be applied, first, to reimbursing the plaintiff for the sum thus paid by him, with interest, and the balance to the satisfaction of the execution under which

v. Jordan, 35 Me. 520; Russell's Appeal, 15 Pa. St. 319; Vierheller's Appeal, 24 Pa. St. 105, 62 Am. Dec. 365.

[308] Shanks v. Simon, 57 Kan. 385; Reynolds v. Fleming, 43 Minn. 513; Block v. Morrison, 112 Mo. 343.

Digitized by Google

the sale was made. A sale in the absence of compliance with this statute is void.[309]

We have already shown that the mere possession of lands is prima facie evidence of a legal estate, and is subject to execution.[310] It may be shown, however, that such possession, instead of being held by virtue of some legal title, is held by the sufferance and at the will of the owner, or by virtue of a contract of purchase or of some purely equitable title. When such a showing is made, the presumption arising from the defendant's possession is rebutted; and we think, as a necessary consequence of such rebuttal, the interest of the defendant ought to be declared not subject to execution. Such has uniformly been the case when the defendant's possession has been shown to be permissive or by mere tenancy at will. But some contrariety of opinion has been expressed in cases where the possession was held in connection with and by virtue of a contract to purchase, or of some other equitable title. The majority of the cases have, we believe, affirmed that the interest of the vendee, before full payment, is not subject to execution though he is found in possession of the property.[311] In New York and in Ohio a different result was announced;[312] but in neither of these states did the courts venture to express an opinion whether, by the execution sale, the purchaser acquired anything beyond the mere possession. Since the early decisions in New York were pronounced, a

[309] Code Georgia, ed. 1895, §§ 5432, 5433; Green v. Hill, 101 Ga. 258; Bradwell v. Bank of Bainbridge, 103 Ga. 242; Mackenzie v. Howard, 93 Ga. 236.

[310] See § 175.

[311] Ellis v. Ward, 7 Smedes & M. 651; Frost v. Reynolds, 4 Ired. Eq. 494; Badham v. Cox, 11 Ired. 456.

[312] Jackson v. Scott, 18 Johns. 94; Jackson v. Parker, 9 Cow. 73.

Digitized by Google

statute has been enacted, under which means are provided for reaching the interests of vendees in possession under contracts of purchase; but the sale of such interests, under an ordinary levy and sale, is forbidden and made void.[313] A provision of the Code of Civil Procedure of New York declared that the "real property which may be levied upon by virtue of a warrant of attachment includes any interest in real property, either vested or not vested, which is capable of being aliened by the defendant." Another section of the same code provides that the "interest of a person holding a contract for the purchase of real property is not bound by the docketing of the judgment, and cannot be levied upon or sold by virtue of the execution issued upon such judgment." It was held, in construing these apparently conflicting provisions, that while an interest held under a contract to purchase real property is not ordinarily subject to execution, it is so subject when the judgment has been preceded by an attachment of the interest sought to be sold.[314]

Stipulations are sometimes inserted in contracts for the sale of real property that the purchaser will not assign without the consent of the vendor. Such a provision, it is said, "concedes the alienable quality of the interest, and provides by a personal covenant of the vendee against it." A sale under execution against him is not a breach of this covenant, and the purchaser acquires the same interest as if a voluntary assignment had been made to him with the consent of the vendor.[315]

[313] Boughton v. Bank of Orleans, 2 Barb. Ch. 458; Griffin v. Spencer, 6 Hill, 525; Sage v. Cartwright, 9 N. Y. 49.

[314] Higgins v. McConnell, 130 N. Y. 482.

[315] Jackson v. Silvernail, 15 Johns. 278; Higgins v. McConnell, 130 N. Y. 482.

Digitized by Google

CHAPTER XIII.

THE LIEN OF EXECUTIONS.

§ 195. General nature and effect of the lien.
§ 196. Differences between execution and other liens.
§ 197. Property subject to execution liens.
§ 198. Territorial extent of the lien.
§ 199. At common law, commences at the teste of the writ.
§ 200. By statute, commences with the delivery of the writ for execution.
§ 201. By statute, commences with the levy of the writ.
§ 202. Duration of execution liens.
§ 203. Liens under writs of equal date or teste.
§ 204. Liens under writs from the courts of the United States.
§ 205. Judgment lien not continued by execution.
§ 206. Lien is dormant while the writ is not being executed in good faith.
§ 207. Lien not to be lost during the life of the writ except by some act or fault of the plaintiff.

§ 195. General Nature and Effect of the Lien.—In all that has heretofore been said regarding the property subject to execution, we have assumed that the property spoken of at the time the officer sought to make his levy belonged to the defendant. There are many instances, however, in which property may lawfully be taken in execution after the defendant's interest therein has ceased. These instances arise in all cases where the property is subject to some lien by which it is bound for the express purpose that it may be made available to the satisfaction of the execution. Hence, it becomes the duty of an officer, on receipt of an execution, to inquire, not merely in reference to the property at present owned by the defendant, but also in regard to all other property, whether now his or not, liable

Digitized by Google

to the execution. Thus, the judgment may be a lien on real estate belonging to the defendant at its rendition, and since alienated by him; or property, real or personal, may have been attached at the institution of the suit, and may therefore be liable to be taken in execution, though it has since been sold by the defendant. The subjects of attachments and of judgment liens do not come within the scope of this work. Our readers must look elsewhere for information concerning these two important themes.[1] In many of the states a lien arises from the execution itself. This lien, being within the scope of our work, must be treated here. The lien of an execution, like other liens, does not of itself transfer title. It does not change the right of property, and vest it at once in the plaintiff in execution nor in the officer charged with the execution of the writ.[2] It confers, however, the right to levy on the property to the exclusion of all transfers and liens made by the defendant subsequent to commencement of the execution lien.[3] The object of the lien is to make a judgment and execution effective by cutting off all transfers and assignments made after the inception of the lien. It attends the right to have the judgment satisfied, and must be understood as existing in favor of every person who has this right, whether he appears on the record as a plaintiff or a defendant, and words in the statute apparently vesting the lien in one of the parties only may be treated as inadvertently used. Thus, though the code of Alabama provides for an execution lien on the lands and personal prop-

1 See Drake on Attachment; Freeman on Judgments, c. 14.

2 Otey v. Moore, 17 Ala. 280, 52 Am. Dec. 173; Finney v. Harding, 136 Ill. 573; Travers v. Cook, 42 Ill. App. 580.

3 Dixon v. Duke, 85 Ind. 434; Lynn v. Gridley, Walk. (Miss.), 548, 12 Am. Dec. 591.

Digitized by Google

erty of the defendant subject to levy and sale, it was held, and properly, that if the defendant recovered a judgment against the plaintiff, upon which an execution issued against the latter, his property was subject to the execution lien.[4]

When the levy and sale are made, the title relates back to the inception of the lien, and thus takes precedence over all transfers and encumbrances made subsequently to such inception. It has been held that an execution lien does not, prior to levy, create a vested right; and therefore that property subject to such lien may by act of the legislature be exempted from execution.[5] Conceding that an execution lien is not a vested right, and that the legislature may, therefore, impair or destroy it, any statute which it may enact abolishing or restricting such liens will not be construed as operating retroactively, unless the intention that it shall so operate is clearly apparent from its provisions.[6]

It is certain that the owner of property bound by an execution lien may convey or transfer the legal title, subject, however, to its being subsequently devested by a seizure and sale while in the hands of his vendee.[7] Though the sheriff may seize property in the hands of such vendee, and sell it for the purpose of satisfying the lien, he has not, prior to seizure, any special property in the goods, and therefore cannot sustain an ac-

[4] Hullett v. Hood, 109 Ala. 345.

[5] Norton v. McCall, 66 N. C. 159; Ladd v. Adams, 66 N. C. 164.

[6] Warren v. Jones, 9 S. C. 288; Carrier v. Thompson, 11 S. C. 79.

[7] Smallcomb v. Cross, 1 Ld. Raym. 252; Hotchkiss v. McVickar, 12 Johns. 406; Folsom v. Chesley, 2 N. H. 432; Churchill v. Warren, 2 N. H. 298; Bates v. Moore, 2 Bail. 614; Jones v. Judkins, 4 Dev. & B. 454; Payne v. Drewe, 4 East, 523; Samuel v. Duke, 3 Mees. & W. 622; 6 Dowl. P. C. 536; 1 H. & H. 127.

Digitized by Google

tion of trover against one who converts them.[8] Whether the lien of an execution be regarded as taking effect from its teste or from its delivery to the sheriff, the result of the lien, after it is conceded to have become operative, is the same. It authorizes the officer to seize and sell the goods wherever they may be found, although since its inception they may have been sold to a purchaser without notice,[9] or their owner may have died.[10] A wagon was by the owner placed in the possession of a mechanic for the purpose of making repairs thereon; and having made such repairs, he was, under the statutes of the state, entitled to a lien upon the property therefor. It was shown, however, that prior to the placing of the wagon in possession of the mechanic, a writ of fieri facias against the owner had been delivered to a constable for service, of which fact the mechanic was ignorant until after he made the repairs. It was held that the mechanics' lien could not displace that of the execution, and that the officer was entitled to recover possession of the wagon.[11] So where mortgages existed against a railroad, under which proceedings were

[8] Hathaway v. Howell, 54 N. Y. 97; Hotchkiss v. McVickar, 12 Johns. 406; Paysinger v. Shumpard, 1 Bail. 237; Mulheisen v. Lane, 82 Ill. 117.

[9] Marshall v. Cunningham, 13 Ill. 20; Lindley v. Kelley, 42 Ind. 294; Million v. Riley, 1 Dana, 359, 25 Am. Dec. 149; Newell v. Sibley, 1 South. 381; Barnes v. Hayes, 1 Swan, 304; Evans v. Barnes, 2 Swan, 292; Duncan v. McCumber, 10 Watts, 212.

[10] Becker v. Becker, 47 Barb. 497; Dodge v. Mack, 22 Ill. 93; Den v. Hillman, 2 Halst. 180; Parkes v. Mosse, Cro. Eliz. 181; Waghorne v. Langmead, 1 Bos. & P. 571; Preston v. Surgoine, Peck, 72; Black v. Planters' Bank, 4 Humph. 367; Harvey v. Berry, 1 Baxt. 252; Trevillian v. Guerrant, 31 Gratt. 525. In Kentucky, though no sale can be made after defendant's death, the lien continues, and may be enforced in equity. Burge v. Brown, 5 Bush, 535, 96 Am. Dec. 369.

[11] McCrisaken v. Osweiler, 70 Ind. 131.

Digitized by Google

taken resulting in the appointment of a receiver, but it appeared that prior to such proceedings sundry creditors had placed executions in the hands of proper officers, the court determined that these execution creditors were entitled to funds arising from the income of the road in preference to the receiver.[12] In the absence of a statutory provision giving it some greater effect, an execution lien, like that of a judgment, attaches to the real rather than the apparent interest of the defendant. If the title held by him is subject to equities of third persons, the execution lien is also subordinate to such equities.[13] "The fountain cannot rise higher than its source." In all attempts to acquire rights under the execution, the title of the defendant must be regarded as the source beyond which it will be impossible to proceed. If his title is impaired by equities or liens which are susceptible of assertion against him, they will be equally susceptible of assertion against the execution lien; and the lien may be destroyed, or, more correctly speaking, may be proved never to have existed, by evidence of some pre-existing conveyance, of which the judgment creditor had no actual or constructive notice when his lien was supposed to have attached. Upon this subject the statutes of the various states are not harmonious. Some of them treat the holder of a judgment or execution lien and a purchaser of property under a judgment in favor of himself as purchasers, and extend to them the same protection as to bona fide purchasers for value. Where laws of this character prevail, an execution lien may become paramount to an unrecorded

[12] Gilbert v. Washington City V. M. & G. S. R. R., 33 Gratt. 645.
[13] McAdow v. Black, 4 Mont. 475; Thames v. Rembert's Ad., 63 Ala. 561; The Vigilancia, 73 Fed. Rep. 452.

Digitized by Google

conveyance or incumbrance and to secret equities existing against the defendant in execution.[14]

§ 196. Differences between Execution and Other Liens.—There are some very important differences between the operation of a lien by execution and that of a lien by judgment or mortgage. A judgment or mortgage lien cannot be displaced by a sale made under any junior lien. The purchaser at the sale under the junior lien acquires a title which may be divested by a subsequent sale under an elder lien. With sales made under execution, the rule is different. If a sheriff has two or more writs in his hands, it is his duty to apply the proceeds to the writ having the elder lien. He may, however, levy and sell under the junior writ. If he does so, the purchaser acquires title to the property sold, free from the lien of all the other writs.[15] In such an event, the plaintiff under whose junior writ the levy and sale were made is not entitled to the proceeds of the sale. On the contrary, it is the duty of the sheriff to apply these proceeds to the several writs that may be in his hands, according to their priority as liens.[16] A sale, when made by the officer, is not for the benefit of the particular writ under which it is made, but for the benefit of all writs in his hands,

[14] England v. Forbes. 7 Houst. (Del.) 301; Lusk v. Reel, 36 Fla. 418, 51 Am. St. Rep. 32; Jellett v. Wilkie, 22 Can. S. C. 282.

[15] Jones v. Judkins, 4 Dev. & B. 454, 34 Am. Dec. 392; Lambert v. Paulding, 18 Johns. 311; Rogers v. Dickey, 1 Gilm. 636, 41 Am. Dec. 204; Marsh v. Lawrence, 4 Cow. 461; Rowe v. Richardson, 5 Barb. 385; Isler v. Moore, 67 N. C. 74; Woodley v. Gilliam, 67 N. C. 237; Samuel v. Duke, 3 Mees. & W. 622; 6 Dowl. P. C. 536; 1 H. & H. 127; Speelman v. Chaffee, 5 Colo. 247; Love v. Williams, 4 Fla. 126. This rule is in Alabama limited to sales of personal property. Lancaster v. Jordan, 78 Ala. 197.

[16] Everingham v. National C. B., 124 Ill. 527; Gillespie v. Keating, 180 Pa. St. 150, 57 Am. St. Rep. 622; Hanauer v. Casey, 26 Ark. 352.

Digitized by Google

according to their respective priorities. The purchaser at the sale need not concern himself about the priorities of the writs nor the distribution of the proceeds. The officer, on the other hand, must be attentive to these matters. For, though he may have sold under a junior writ, if he pays the money to the plaintiff therein, he may afterward be compelled to pay it on the writ properly entitled thereto.[17] From the propositions herein stated there is some dissent. Several courts have insisted that if an officer makes a levy and sale under a writ, he must apply the proceeds thereof to the satisfaction of that writ, though there was another in his hands entitled to precedence and under which he ought to have sold,[18] and that the plaintiff in the elder writ cannot claim the proceeds of the sale which was not made under it, and must seek his remedy against the officer by an action for a false return, or some other proceeding to enforce liability for misconduct or negligence.[19] A judgment lien is paramount to the liens of all younger judgments, whether entered in the same or in different courts. But an execution lien does not necessarily take precedence over the liens of junior executions. There may be several writs in force against

[17] Jones v. Judkins, 4 Dev. & B. 454; Green v. Johnson, 2 Hawks, 309; Jones v. Atherton, 7 Taunt. 56; Drewe v. Lainson, 11 Ad. & E. 537; Sawle v. Paynter, 1 Dowl. & R. 307; Furman v. Christie, 3 Rich. 1; Rogers v. Dickey, 1 Gilm. 636; Kirk v. Vonberg, 34 Ill. 440; Huger v. Dawson, 3 Rich. 328; Peck v. Tiffany, 2 N. Y. 451; Marshall v. McLean, 3 G. Greene, 363; Million v. Commonwealth, 1 B. Mon. 311; Russell v. Gibbs, 5 Cow. 390; Rowe v. Richardson, 5 Barb. 385; Kennon v. Ficklin, 6 B. Mon. 415; Smallcomb v. Cross, 1 Ld. Raym. 251; Speelman v. Chaffee, 5 Colo. 247; Love v. Williams, 4 Fla. 126; Faircloth v. Ferrell, 63 N. C. 640; Garner v. Cutler, 28 Tex. 175.

[18] Doe v. Ingersoll, 11 S. & M. 249, 49 Am. Dec. 57; McClelland v. Slingluff, 7 W. & S. 134, 42 Am. Dec. 224.

[19] Love v. Williams, 4 Fla. 126; Rybot v. Peckham, 1 T. R. 731 n; Rowe v. Tapp, 9 Price, 317; Smallcorn v. Lond, Comb. 428.

Digitized by Google

the same defendant at the same time. Some of these may be in the hands of a United States marshal, others in the hands of the sheriff of the county, and others in the hands of a constable. Now, if these several writs were to enforce judgments which were liens on real estate, the elder judgment lien would prove paramount, irrespective of the teste, delivery, or levy of the respective writs. But if there are no liens, except such as arise from the writs, the rule is different. The officer who succeeds in making the first levy thereby obtains priority for his writ, and secures it the right to be first paid out of the proceeds of the sale.[20]

§ 197. In Determining What Property is Subject to Execution Liens, we have only to consider the purpose in aid of which such liens have been created by law. This purpose was to prevent the defendant from alienating such property as the plaintiff was entitled to take in satisfaction of his writ. Therefore, as a general rule, all property subject to execution is subject to an execution lien.[21] "The lien of an execution is operative upon, and binds all property, real and personal, which is the subject of levy and sale in obedience to its mandate; and, of consequence, it is some-

[20] Moore v. Fitz, 15 Ind. 43; McCall v. Trevor, 4 Blackf. 496; Jones v. Davis, 2 Ala. 730; Ray v. Harcourt, 19 Wend. 495; Irwin v. Sloan, 2 Dev. 349; Arberry v. Noland, 2 J. J. Marsh. 421; Field v. Millburn, 9 Mo. 492; McClelland v. Slingluff, 7 Watts & S. 134; Dubois v. Harcourt, 20 Wend. 41; Wylie v. Hyde, 13 Johns. 249; Kring v. Green, 10 Mo. 195; Peck v. Robinson, 3 Head, 438; Million v. Commonwealth, 1 B. Mon. 311; Pritchard v. Toole, 53 Mo. 356; Lash v. Gibson, 1 Murph. 266; Tilford v. Burnham, 7 Dana, 109; Pulliam v. Osborne, 17 How. 471; Leopold v. Godfrey, 11 Biss. 158; Longstreet v. Hill, 11 Heisk. 53.

[21] Second N. B. v. Gilbert, 174 Ill. 485; Dublin v. Hayes, 99 Ind. 463; Million v. Riley, 1 Dana (Ky.), 360, 25 Am. Dec. 149; Stewart v. Beale, 7 Hun, 405, 68 N. Y. 629; Barnes v. Hayes, 1 Swan, 304; Huling v. Cabell, 9 W. Va. 522, 27 Am. Rep. 562.

Digitized by Google

times termed a general lien, to distinguish it from liens which operate only on specific or particular property. And the lien operates upon and binds, not only the property subject to its mandate, which is in the possession of the defendant, or the title to which stands in his name, but it operates equally on all such property, with the title to which he has parted for the purpose of hindering, delaying, and defrauding his creditors until there is the coming in of a bona fide purchaser without notice and for a valuable consideration from the fraudulent grantee or donee having the possession."[22] "An execution binds the estate of the defendant from the time it is delivered to the proper officer. This applies to every species of estate subject to levy and sale under execution, whether so at the common law or made subject by statute."[23] Where the interest of a purchaser of market stalls is subject to execution, it is equally subject to an execution lien.[24] On the other hand, it must be true that no property not subject to execution can be subject to execution lien, for it would be idle to declare the existence of a lien, and at the same time maintain that no proceedings can be had for its enforcement. Exempt property may therefore be sold or exchanged while writs against the owner are in the officer's hands, without imperiling the title of the vendee.[25] If the owner should, however, decline to claim his exemption where

[22] Mathews v. Mobile M. I. Co., 75 Ala. 88; First N. B. v. Maxwell, 123 Cal. 360, 70 Am. St. Rep. 64; Union N. B. v. Lane, 107 Ia. 543, 70 Am. St. Rep. 216; Atwater v. American Exch. N. B., 152 Ill. 605.

[23] Whitehead v. Woodruff, 11 Bush. 214.

[24] Green v. Western N. B., 86 Md. 279.

[25] Godman v. Smith, 17 Ind. 152; Paxton v. Freeman, 6 J. J. Marsh. 234, 22 Am. Dec. 74: Citizens' State Bank v. Harris, 149 Ind. 208.

Digitized by Google

the law makes it his duty so to do, we presume that this waiver of his rights would impress the property with the legal characteristics of property subject to execution, at least so far as to entitle the holders of several writs to share in the proceeds according to the respective priorities of such writs.

In a state where growing crops are liable to be seized and sold, they are bound by the execution lien;[26] while, in states where they cannot be levied upon till gathered, they are not before gathering subject to such lien.[27] Money passes rapidly from hand to hand, and is incapable of identification. It must necessarily, on this account, and also as a matter of public policy, be exempted from the operation of execution liens.[28] Though we have met with no authorities on the subject, we think that all property which on principles of public policy and the necessities of commerce is exempted from the law of lis pendens[29] is also exempt from the lien of executions. In Virginia and West Virginia all personal property, including choses in action, owned by the debtor from the delivery of the writ to the officer to the return day thereof, is by statute subject to execution liens.[30] Under the statutes of these states the lien of an execution is not effective against persons acquiring property without notice thereof and purchasers in good faith and for a valuable consideration. Where such purchasers are not prejudiced by a lien of which they are ignorant,

[26] Lindley v. Kelley, 42 Ind. 294.

[27] Evans v. Lamar, 21 Ala. 333; Adams v. Tanner, 5 Ala. 740; Edwards v. Thompson, 85 Tenn. 720, 4 Am. St. Rep. 807.

[28] Doyle v. Sleeper, 1 Dana, 531.

[29] For property not bound by lis pendens, see Freeman on Judgments, sec. 194.

[30] Puryear v. Taylor, 12 Gratt. 401; Huling v. Cabell, 9 W. Va. 531, 27 Am. Rep. 562.

Digitized by Google

there is no reason why the lien of the writ may not be declared to extend to every species of property subject to execution, and, hence, may include within it money and choses in action, whether negotiable or not. Therefore in those states the "lien of a fieri facias attaches to all choses in action of the debtor in existence at the return day of the fieri facias, except that, as against a person making payment to the judgment debtor, the lien shall be valid only from the time he has notice thereof." [31] Funds of a railway corporation on deposit in a bank do not pass to the receiver of a corporation, if an execution against it has been placed in the hands of the proper officer before the receiver has executed his official bond and thereby perfected his title.[32] Property manufactured for sale,[33] and the interest of a partner in the assets of a firm,[34] are subject to execution liens; but the execution against the partner is subordinate as a lien to subsequent executions against the partnership.[35] An officer having an execution in his hands is entitled to levy it upon any property which he may find belonging to the defendant, although acquired subsequently to the delivery of the writ. As the lien of the writ attaches to all property on which the officer charged with its execution may lawfully levy upon under it, such lien necessarily includes property acquired by the defendant after the issuing of the writ and up to the time when the offi-

[31] Huling v. Cabell, 9 W. Va. 522, 531, 27 Am. Rep. 562; Wiant v. Hayes, 38 W. Va. 681; Hicks v. Roanoke B. Co., 94 Va. 741.

[32] Frayser's Ad. v. Richmond etc. R. R. Co., 81 Va. 388; Davis v. Bonney, 89 Va. 755.

[33] Sawyer v. Ware, 36 Ala. 675.

[34] Wiles v. Maddox, 26 Mo. 77.

[35] Crane v. French, 1 Wend. 311; Dunham v. Murdock, 2 Wend. 553; Fenton v. Folger, 21 Wend. 676.

Digitized by Google

cer's authority to act thereunder terminates.[36] Hence, if a horse of the defendant is exchanged for another while the writ is in force, both become subject to the lien, and may be taken and sold.[37]

§ 198. The Territorial Extent of Execution Liens varies in different states. The object of the lien is to bind the property which can be seized under the writ. Hence, the usual rule is, that property situate within the territory in which the writ may be executed is bound, while property outside of that territory is not bound.[38] Writs are commonly to be executed in the county where they are issued, and their lien is ordinarily confined to the same county.[39] But where a writ may be sent to another county for execution, no doubt it will create a lien on the debtor's property therein from the time it is delivered to the officer for service. In some of the states the successful suitor in the appellate court may have execution issued upon its judgment to any county in the state. Very serious inconvenience and apparent injustice may arise from the enforcement of a rule maintaining the lien of an execution so issued as effective of any date prior to its delivery to an officer of the county for execution. For while it may be practicable for an intending purchaser to ascertain in the office of the sheriff of his county whether there are any writs there against the vendor,

[36] Blatchford v. Boyden, 122 Ill. 657; Second N. B. v. Gilbert, 174 Ill. 485; Shafner v. Gilmore, 3 Watts & S. 438; Lea v. Hopkins, 7 Pa. St. 492; Ruttan v. Levisconte, 16 U. C. Q. B. 495.

[37] Grooms v. Dixon, 5 Strob. 149; Orchard v. Williamson, 6 J. J. Marsh. 561, 22 Am. Dec. 102.

[38] Hardy v. Jasper, 3 Dev. 158; Gott v. Williams, 29 Mo. 461; Roth v. Wells, 29 N. Y. 471.

[39] Claggett v. Foree, 1 Dana, 428; Pond v. Griffin, 1 Ala. 678; Beebe v. United States, 161 U. S. 104; Re Geis L. Co., 7 App. Div. 550.

Digitized by Google

such inquiry cannot reasonably extend to the capital in a remote part of the state. These hardships, though urged in the supreme courts of North Carolina and Tennessee, were not so potent as to preclude them from maintaining the lien of its execution from the teste of the writ.[40] In truth, the operation of an execution lien is necessarily productive of hardship when it commences at any time prior to the levy of a writ, unless restricted to persons who have notice thereof or who are not purchasers in good faith and for value of property subject thereto. This consideration has induced the legislatures of various states to take action for the prevention of such injustice. Some of them have destroyed the lien altogether, others have restricted it to the levy of the writ, and still others have made it operative only from the time when it was received by the officer charged with its execution. In those states where the legislature has not interposed to mitigate the hardships of the common-law rule, it seems to us that the lien must necessarily extend wherever the writ itself may lawfully be executed, irrespective of the place of residence of the defendant in execution or of the locality of the court whence the writ issues. Therefore, if a writ when issued may properly be sent to a distant part of the state, and there be levied upon property of the defendant, it must be there regarded as a lien, and if it may be executed in every part of the state, it creates a lien on the property of the defendant wheresoever situate within that state.[41] If property, when bound by an execution lien, is removed to another county or state, and is

[40] Rhyne v. McKee, 73 N. C. 259; Johnson v. Ball, 1 Yerg. 291, 24 Am. Dec. 451.

[41] Allen v. Plummer, 63 N. C. 307; Rhyne v. McKee, 73 N. C. 259; Woodward v. Hill, 3 McCord, 241; Cecil v. Carson, 86 Tenn. 139.

Digitized by Google

afterward returned, it is still subject to the lien;[42] or, if the removal be to another county, the lien may be made available by taking out an execution to that county.[43]

§ 199. Lien at Common Law Dated from the Teste of the Writ.—At common law a fieri facias was a lien upon the personal property of the defendant from its teste.[44] This teste might be the first day of the term, and hence long anterior to the issue of the writ and to the actual rendition of the judgment. Alienations and encumbrances, made in perfect good faith, were therefore liable to be defeated by executions actually issued long subsequent thereto.[45] The hardships visited upon purchasers and encumbrancers were to some extent obviated by statute 29 Charles II., c. 3. This statute was never adopted in some parts of the United States. The common-law rule, under which the goods of the defendant are bound from the teste of execution against him, still prevails in Tennessee.[46] The com-

[42] Hood v. Winsatt, 1 B. Mon. 211; McMahan v. Green, 12 Ala. 71; Claggett v. Foree, 1 Dana, 428; Newcombe v. Leavitt, 22 Ala. 631; Lambert v. Paulding, 18 Johns. 311; McMahan v. Green, 12 Ala. 71, 46 Am. Dec. 242; Street v. Duncan, 117 Ala. 571; Mitchell v. Ashby, 78 Ky. 254.

[43] Forman v. Proctor, 9 B. Mon. 125; Hill v. Slaughter, 7 Ala. 632.

[44] Palmer v. Clark, 2 Dev. 354, 21 Am. Dec. 340; Hanson v. Barne's Lessee, 3 Gill & J. 359, 22 Am. Dec. 322; Jones v. Jones, 1 Bland, 443, 18 Am. Dec. 327.

[45] Anonymous, Cro. Eliz. 174; Baskerville v. Brocket, Cro. Jac. 451; Bingham on Judgments and Executions, 190; Payne v. Drewe, 4 East, 538; Edwards v. Thompson, 85 Tenn. 720, 4 Am. St. Rep. 807.

[46] Stahlman v. Watson (Tenn. Ch. App.), 39 S. W. 1055; Edwards v. Thompson, 85 Tenn. 720, 4 Am. St. Rep. 807; Cecil v. Carson, 86 Tenn. 139; Coffee v. Wray, 8 Yerg. 464; Peck v. Robinson, 3 Head. 438; Johnson v. Ball, 1 Yerg. 291, 24 Am. Dec. 451; Cox v. Hodge, 1 Swan, 371; Battle v. Bering, 7 Yerg. 529, 27 Am. Dec. 526; Union Bank v. McClung, 9 Humph. 91; Daley v. Perry, 9 Yerg. 442; Ander-

Digitized by Google

mon-law rule prevailed in North Carolina until a comparatively recent date.[47] It was modified in 1869 by declaring in section 261 of the Code of Civil Procedure that "No execution against the property of the judgment debtor shall be a lien on the personal property of such debtor as against any bona fide purchaser from him for a valuable consideration, or as against any other execution, except from the levy thereof."[48] In Tennessee a judgment cannot relate, so as to form a lien upon the real estate of the debtor as against a bona fide purchaser, beyond the true time of its rendition, and it has hence been held that the lien of an execution upon the personal property of the debtor cannot be held to relate to an earlier or different period than the date of the judgment. If the law provides a time when the court shall open, the lien of an execution cannot be effective against a bona fide purchaser at an earlier hour of the day on which the judgment was rendered than that fixed for the opening of the court on such day.[49] Therefore, though the writ is tested on the first day of the term, yet if the record shows that the judgment was rendered on a day subsequent to the teste, the lien will not defeat a bona fide sale or transfer of personal property made between the teste and the rendition of the judgment.[50] Where there is nothing on the record to show at what hour the court met

son v. Taylor, 1 Tenn. Ch. 436. With respect to lands there is no execution lien in this state. They are bound only by the judgment lien or by a levy of the writ. Anderson v. Taylor, 6 Lea, 382.

[47] Green v. Johnson, 2 Hawks, 309, 11 Am. Dec. 763; Stamps v. Irvine, 2 Hawks, 232; Gilkey v. Dickerson, 3 Hawks, 293; Beckerdite v. Arnold, 3 Hawks, 296; State v. Ferrell, 63 N. C. 640.

[48] Sawyers v. Sawyers, 93 N. C. 321; Weisenfield v. McLean, 96 N. C. 248; Sawyer v. Bray, 102 N. C. 79, 11 Am. St. Rep. 713.

[49] Berry v. Clements, 9 Humph. 312.

[50] Cecil v. Carson, 86 Tenn. 139.

Digitized by Google

on the first day of the term, the fiction of relation applies, and a judgment rendered on that day must be held to relate to the first moment of the day, and execution issued thereon, tested of that day, must necessarily have the same relation.[51]

Executions issued out of justices' courts also form exceptions to the general rule, and are not liens till levied.[52] Trust estates were not subject to execution at common law. The construction of the statute under which they were in England made liable to execution is such that they are not bound by the writ until actually levied upon.[53] The assets of a copartnership are first liable to the partnership debts. Until these debts are satisfied, neither the individual partners nor their creditors have any right to participate in the assets. Hence, an assignment to pay partnership debts has in North Carolina been held to take precedence over an execution against one of the partners, tested prior to the assignment.[54]

§ 200. Statutes Making the Lien Commence at the Delivery of the Writ.—To alleviate the hardship and injustice of the common law, "it is enacted by the 29 of Car. II., c. 3, sec. 16, that no fieri facias or other writ shall bind the property or goods, but from the time such writ shall be delivered to the sheriff to be executed, who, on his receipt of it shall indorse the day of his receipting the same; that is, that if, after the writ is so delivered, the defendant makes an assign-

[51] Cox v. Hodge, 1 Swan, 373.

[52] Parker v. Swan, 1 Humph. 80; Farquhar v. Toney, 5 Humph. 502.

[53] Morisey v. Hill, 9 Ired. 66; Hall v. Harris, 3 Ired. Eq. 289; Williamson v. James, 10 Ired. 162.

[54] Watt v. Johnson, 4 Jones, 190; Harris v. Phillips, 4 S. W. Rep. 196.

Digitized by Google

ment of his goods (except in market overt), the sheriff may anywhere take them in execution." [55] This statute was adopted very generally on this side of the Atlantic; and while it is steadily giving way before statutory provisions, under which the lien of executions is entirely abolished, it is still substantially the law in about one-half of the states.[56] In Ohio, when several writs of execution are sued out during the term in which judgment was rendered, or within ten days thereafter, or when two or more writs against the same debtor are delivered to an officer on the same day, no

[55] Bingham on Judgments and Executions, 190; Hutchinson v. Johnston, 1 Term Rep. 729.

[56] Frayser's Ad. v. Richmond etc. Ry. Co., 81 Va. 388; Wiant v. Hayes, 38 W. Va. 681; The Daniel Kaine, 35 Fed. Rep. 785; In re Paine, 17 Nat. Bank Reg. 37; Whitehead v. Woodruff, 11 Bush, 209; Durbin v. Haines, 99 Ind. 463; Perkins v. Brierfield I. & C. Co., 77 Ala. 403; Davis v. Oswalt, 18 Ark. 414; Hanauer v. Casey, 26 Ark. 352; Lawrence v. McIntire, 83 Ill. 399; McMahan v. Greene, 12 Ala. 71; Layton v. Steel, 3 Harr. (Del.) 512; Taylor v. Horsey, 5 Harr. (Del.) 131; People v. Bradley, 17 Ill. 485; Garner v. Willis, Breese, 370; Leach v. Pine, 41 Ill. 65; Kennon v. Ficklin, 6 B. Mon. 414; Cones v. Wilson, 14 Ind. 465; Vandibur v. Love, 10 Ind. 54; Tabb v. Harris, 4 Bibb, 29; Million v. Riley, 1 Dana, 359, 25 Am. Dec. 149; Duffy v. Tounsend, 9 Mart. (La.) 585; Arnott v. Nicholls, 1 Har. & J. 473; Selby v. Magruder, 6 Har. & J. 454; Giese v. Thomas, 7 Har. & J. 459; Furlong v. Edwards, 3 Md. 99; Brown v. Burrus, 8 Mo. 26; Gott v. Williams, 29 Mo. 461. But the rule in Missouri is now different. Wagner's Stats., p. 607; Newell v. Sibley, 1 South. 381; Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348; Camp v. Chamberlain, 5 Denio, 198; Hale v. Sweet, 40 N. Y. 98; Lambert v. Paulding, 18 Johns. 311; Beals v. Allen, 18 Johns. 363, 9 Am. Dec. 221; Hodge v. Adee, 2 Lans. 314; Cresson v. Stout, 17 Johns. 116, 8 Am. Dec. 373; Lewis v. Smith, 2 Serg. & R. 157; Cowden v. Brady, 8 Serg. & R. 505; Childs v. Dilworth, 44 Pa. St. 123; Puryear v. Taylor, 12 Gratt. 401; Lynch v. Hanahan, 9 Rich. 186; Harris v. Phillips, 49 Ark. 58; Joslin v. Spangler, 13 Colo. 491; Green v. Walker, 5 Del. Ch. 26; Kimball v. Jenkins, 11 Fla. 111, 89 Am. Dec. 237; Hanchett v. Ives, 133 Ill. 332; Moss v. Jenkins, 146 Ind. 589; Dann M. Co. v. Parkhurst, 125 Ind. 317; Chenault v. Bush, 84 Ky. 528; Soaper v. Howard, 85 Ky. 256; Sickles v. Sullivan, 19 N. Y. Supp. 749; Re Muelfeld, 42 N. Y. Supp. 802.

Digitized by Google

preference is given to either of such writs, but if a sufficient sum is not made to satisfy all the executions, the amount shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases the writ first delivered to the officer shall be first satisfied.[57]

The requirement of the statute that the sheriff shall indorse on the writ the time at which it is received was designed to furnish evidence by which to determine precisely when the lien attached. If the sheriff omits the performance of this portion of his duty, the plaintiff's rights are so far prejudiced that he may be compelled to furnish other evidence by which to prove the time at which his lien commenced. If he succeeds in making such proof, the absence of the indorsement becomes immaterial.[58]

Leaving a writ at the sheriff's office, or at his usual place of business, is equivalent to delivering it to him personally.[59] The lien commences at once, though the writ is received out of office hours.[60] The decisions affirming that a writ of execution may be delivered to an officer at his place of business, though it is not his office and he is not there to receive it, are of questionable propriety and correctness. The requirement of the statute that an officer enter upon the writ the time of its receipt by him implies that it shall be delivered to him at his office, or, at least, at such a place and under such circumstances that he may make such

[57] Rev. St. § 5882; Meier v. Bank, 55 Oh. St. 446.

[58] Hester v. Keith, 1 Ala. 316; Hale's Appeal, 44 Pa. St. 438; Childs v. Jones, 60 Ala. 352; McMahan v. Green, 12 Ala. 71, 46 Am. Dec. 242; Johnson v. McLane, 7 Blackf. 501, 43 Am. Dec. 102.

[59] Mifflin v. Will, 2 Yeates, 177.

[60] France v. Hamilton, 26 How. Pr. 180.

Digitized by Google

indorsement as soon as the delivery to him is complete. The clerk of the court may be in the habit of placing the writs as soon as issued by him in a pigeon-hole or other receptacle, to be taken therefrom by the officer. The placing of a writ in such known or usual place, though the officer, in fact, sees it there, is not a delivery to him, and hence does not create a lien against the property of the defendant.[61] While the delivery of a writ to a deputy sheriff is equivalent to a delivery to his principal, leaving the writ in the place of business of the deputy is not a delivery to the latter, and hence cannot operate as a delivery to his principal.[62]

In New York and Virginia, subsequent purchasers and encumbrancers, in good faith and without notice, are protected from the lien of executions not levied.[62a] In Arkansas, while the interest of a partner in personal property may be levied upon and sold under execution for his separate debt, it is not regarded as an aliquot part of such property, but is nothing more than the right to share in such surplus as may arise after the partnership has been wound up, and hence it has been held that he "consequently has no such beneficial interest in the chattels of the firm as will be bound by the general lien of an execution against him individually." The delivery of such a writ to an offi-

[61] Person's Appeal, 78 Pa. St. 145.

[62] Burrill v. Hollands, 78 Hun, 583.

[62a] Ray v. Birdseye, 5 Denio, 619; Thompson v. Van Vechten, 5 Abb. Pr. 458; Butler v. Maynard, 11 Wend. 548; Hendricks v. Robinson, 2 Johns. Ch. 283; Williams v. Shelly, 37 N. Y. 375; Charron v. Boswell, 18 Gratt. 216. An execution lien, though not consummated by levy, will in New York prevail over a mortgage to secure a pre-existing debt, and also over a general assignment for the benefit of creditors. Warner v. Paine, 3 Barb. Ch. 630; Slade v. Van Vechten, 11 Paige, 21; Ray v. Birdseye, 5 Denio, 619.

Digitized by Google

cer, therefore, does not create a lien against the partner's interest in the chattels of the firm.[62b]

In most of the states the rule that the writ first delivered for execution shall become a lien from that date, and shall be entitled to satisfaction over subsequent writs first levied, is confined to writs in the hands of the same officer; as between writs in the hands of different officers, the one first levied obtains priority.[63] Such is not the rule in Illinois. In that state, if different writs against the same defendant are delivered to different officers, they take precedence according to the dates of their respective delivery, and an officer cannot, by first making a levy, obtain priority over a writ previously delivered to another officer.[64]

§ 201. Commences in Some States at the Levy.—As the plaintiff, when he has taken out his execution, is authorized thereby to seize upon all the personal property of the defendant liable to forced sale, there seems but little necessity of allowing him any lien on the defendant's goods, otherwise than such as may be acquired by an actual seizure thereof. If he really designs to execute his writ, he ought to proceed with diligence. Personal property is constantly being subjected to the necessities of commerce. It changes owners with great rapidity in the course of lawful and meritorious business relations. It ought not to be unnecessarily tied up in the hands of any owner. It is true that statutes can be enacted, which, like those in

[62b] Harris v. Phillips, 49 Ark. 58.

[63] McCall v. Trevor, 4 Blackf. 496; Moore v. Fitz, 15 Ind. 43; Commonwealth v. Stratton, 7 J. J. Marsh. 90; Kilby v. Haggin, 3 J. J. Marsh. 212; Million v. Commonwealth, 1 B. Mon. 310. Ante, sec. 196.

[64] Rogers v. Dickey, 1 Gilm. 636, 41 Am. Dec. 204; Hanchett v. Ives, 133 Ill. 332, reversing Hanchett v. Ives, 33 Ill. App. 471.

Digitized by Google

North Carolina, protect purchasers and encumbrancers in good faith without notice.[65] But, without such statutes, transfers made to defraud creditors are void; and thus, without giving any lien to executions, the law avoids the only transfers against which its powers ought to be directed. If an execution is a lien, except as against transfers in good faith, then plaintiffs, in directing levies, and officers acting, whether with or without directions, are constantly placed in the most embarrassing circumstances, as they are required to determine, at their peril, whether an alleged transfer was made in good or in bad faith. In several of the states executions no longer create liens, statutes having been enacted under which the lien does not commence until the levy of the writ.[66] In others substantially the same result has been accomplished by declaring that the lien of a writ cannot be enforced as against bona fide purchasers and incumbrancers acquiring their title prior to the levy and without notice of the writ.[67]

§ 202. With Respect to the Duration of an Execution lien, the laws and decisions in the various states are by no means harmonious. In Virginia, it outlives the execution, and retains its vitality till the judgment on which the writ was issued is satisfied, or is barred

[65] Weisenfield v. McLean, 96 N. C. 248.

[66] Johnson v. Gorham, 6 Cal. 195; Bagley v. Ward, 37 Cal. 121; Reeves v. Sebern, 16 Iowa, 234, 85 Am. Dec. 513; Rev. Statutes of Missouri, 1889, sec. 4922; Tullis v. Brawley, 3 Minn. 277; sec. 5375, Giauque's Rev. Stats. Ohio, 7th ed.; Mercein v. Burton, 17 Tex. 206; McMahan v. Hall, 36 Tex. 59; Russell v. Lawton, 14 Wis. 202; Knox v. Webster, 18 Wis. 406, 86 Am. Dec. 779; Wilson's Appeal, 90 Pa. St. 370; Albrecht v. Long, 25 Minn. 163.

[67] Van Waggoner v. Moses, 26 N. J. L. 570; Stewart v. Beale, 7 Hun. 405; Osborn v. Alexander, 40 Hun. 323; Weisenfield v. McLean, 96 N. C. 248; Trevillian's Ex. v. Guerrant's Ex., 31 Gratt. 525; Huling v. Cabell, 9 W. Va. 522, 27 Am. Rep. 562.

Digitized by Google

by the statute of limitations, or is otherwise extinguished.[68] In Missouri, the lien is continued by statute until a sale of property taken in execution can be made.[69] But as the object of the lien is to prevent the transfer of property liable to be taken under the writ, the general rule is, that the lien continues while the writ remains in force, so that the property may be taken and sold under it, and no longer.[70] The lien does not operate as a constructive levy. Ordinarily, before a lien can become effective, there must be a levy of the writ, and, when the levy is made, it relates to the inception of the execution lien. In the absence of some statutory modification of the common-law rule upon this subject, no levy can be made under a writ after the return day thereof, and, therefore, after that time, the execution lien ceases to exist, except as to property which has before then been levied upon under the writ.[71]

If a levy is made under an execution, the officer thereby obtains a special property in the goods levied upon. He may retain possession, and make a sale after the return day of the writ. Such sale is usually made under a venditioni exponas, though the issuing of that writ is not indispensable, and, in fact, seems to be unnecessary, except where the officer refuses to proceed. A sale made under a venditioni exponas relates back to the delivery or teste of the original execution.[72]

[68] Charron v. Boswell, 18 Gratt. 216; Hicks v. Roanoke B. Co., 94 Va. 741.

[69] Wood v. Messerly, 46 Mo. 255; Tierney v. Spiva, 97 Mo. 98.

[70] Carr v. Glasscock, 3 Gratt. 343; Humphreys v. Hitt, 6 Gratt. 509, 52 Am. Dec. 133.

[71] Chatten v. Gerber, 2 Ind. App. 386; Tabb v. Harris, 4 Bibb. 29, 7 Am. Dec. 732; Walker v. Henry, 85 N. Y. 130; Wiant v. Hays, 38 W. Va. 681; Keniston v. Stevens, 66 Vt. 351; Perkins v. Woolaston, 1 Salk. 321, 2 Ld. Raym. 1256.

[72] Taylor v. Mumford, 3 Humph. 66.

Digitized by Google

Hence, a sale after the lapse of two years, during which plaintiff constantly kept writs of venditioni exponas in the officer's hands, was held to be valid, and to entitle the plaintiff to the same rights as though it had been made during the life of the original writ.[73] But when sales are made under this writ, the lien of the execution has merged into the lien of the levy; for in the absence of a levy there can be no sale under a venditioni exponas. The question, therefore, when a valid levy has been made under the writ, is not with respect to the duration of the execution lien, but to the continuance or duration of the lien created or consummated by the levy.

If no levy has been effected under a writ, and the return day has passed, so that no levy can be made thereunder, the writ is functus officio. The lien was conceded only that the writ might be more surely and effectually executed. But when the writ is legally dead, and can never be executed, it would seem that its lien must also die with it. Nor do we know of any reason why it should be conceded a resurrection and second life. A new or alias execution may be procured, with its attendant lien, and thereunder a levy may be made upon the property of the defendant; but we think the better rule, in the absence of any statutory regulation of the subject, is that the alias must be treated as a new proceeding, having a lien of its own not antedating its teste or delivery, and no power to revive or continue the lien of anterior, defunct writs. The power of an alias to effect such a continuance seems to be affirmed by several North Carolina cases;[74]

[73] Locke v. Coleman, 4 T. B. Mon. 316.

[74] Allen v. Plummer, 63 N. C. 307; McLean v. Upchurch, 2 Murph. 358; Gilky v. Dickerson, 2 Hawks, 341; Harding v. Spivey, 8 Ired.,

Digitized by Google

but we know not how to reconcile these cases with a more recent one in the same state.[75] Alabama has been far more fertile in decisions upon this topic than any other state. When the question first arose in that state, the court denied the continuing existence of the lien of a writ which had been returned into court with the indorsement that no goods of the defendant could be found.[76] But at a later date, the interpretation of the statute of this state permitted the return of an execution to court, without impairing its lien, provided an alias issued before another term elapsed.[77] "If, however, the execution of a junior judgment creditor was levied, and, before a sale under it, the senior judgment creditor had execution issued and placed in the hands of the sheriff, the lien revived, and would prevail over that of the junior judgment creditor." [78] A later statute was construed as making the loss of the lien occasioned by permitting a term to pass after the return of the original writ, and before the issuing of an alias, peremptory and irrevocable.[79] But in the majority of the states in which the question has been adjudicated, the lien of an execution, except as to property levied upon and retained in custody, ceases with the return day of the writ. An alias writ becomes a lien from its teste or delivery, just as an orig-

63; Brasfield v. Whitaker, 4 Hawks, 309; Yarborough v. State Bank, 2 Dev. 23.

[75] Ross v. Alexander, 65 N. C. 577.

[76] McBroom v. Rives, 1 Stew. 72; Cary v. Gregg, 3 Stew. 433; Dargan v. Waring, 11 Ala. 988, 46 Am. Dec. 234.

[77] Wood v. Gary, 5 Ala. 43; Johnson v. Williams, 8 Ala. 529; Perkins v. Brierfield I. & C. Co., 77 Ala. 403.

[78] Toney v. Wilson, 51 Ala. 500; Collingsworth v. Horn, 4 Stew. & P. 237, 24 Am. Dec. 753; Parkes v. Coffey, 52 Ala. 32.

[79] Toney v. Wilson, 51 Ala. 501; Perkins v. Brierfield I. & C. Co., 77 Ala. 403; Carlisle v. May, 75 Ala. 502; Collier v. Wood, 85 Ala. 91.

Digitized by Google

inal writ would in the same state. It has no lien anterior to such teste or delivery; nor can it perpetuate or renew the lien of a prior writ.[80]

The effect on an execution lien of an injunction temporarily arresting the execution of the writ is not well settled. On one side it is contended that if an officer has two writs, and the elder is enjoined, it is his duty to proceed under the younger; and that, as a necessary consequence, the elder must lose its lien,[81] unless the injunction is dissolved before the sale is made under the junior writ.[82] On the other side, it is said that "when the operative energy of an execution has been suspended by an injunction, a sale under a junior execution does not affect the lien acquired by such elder execution, but the property in the hands of any person remains liable to levy when the injunction is removed."[83] Still other cases make the effect of the injunction dependent on security being given when it issues, holding that, if the defendant is indemnified from loss by an appropriate bond, his lien is thereby destroyed; while, in the absence of such bond, that the lien continues, and will become effective whenever the removal of the injunction affords an opportunity to enforce the execution.[84]

§ 203. **Liens under Writs of Equal Priority.**—Writs delivered to the same officer at the same time are equal

[80] Kregelo v. Adams, 9 Biss. 343, 3 Fed. Rep. 628; Sturges' Appeal, 86 Pa. St. 413; Brown v. The Sheriff, 1 Mo. 154; Garner v. Willis, Breese, 368; Watrous v. Lathrop, 4 Sand. 700; Union Bank v. McClung, 9 Humph. 91; Maul v. Scott, 2 Cranch C. C. 367; Ross v. Alexander, 65 N. C. 577.

[81] Mitchell v. Anderson, 1 Hill (S. C.), 69, 26 Am. Dec. 158.

[82] Duckett v. Dalrymple, 1 Rich. 143.

[83] Lynn v. Gridley, Walker (Miss.), 548, 12 Am. Dec. 591.

[84] Conway v. Jett, 3 Yerg. 481, 24 Am. Dec. 590.

Digitized by Google

as liens,[85] and are entitled to share the proceeds of the sale equally, until the smaller is satisfied. In South Carolina and Nebraska, writs delivered on the same day are considered as if delivered at the same time.[86] In the last-named state, the statute declares that, in such cases, if sufficient moneys are not made to satisfy all the writs, "the amount made shall be distributed to the several creditors in proportion to their respective demands."[87] Where two judgments or two executions have no priority over each other as liens, priority may be gained by activity and diligence. He who first begins to execute his writ upon the property of the defendant obtains the right to seek satisfaction out of such property as he has seized, to the exclusion of creditors less diligent than he, but otherwise equally meritorious.[88] If a clerk delivers several executions to the sheriff, one after another, in immediate succession, this is not such "a difference in the time of delivery as to give one a preference over the other." If he, however, indorses on them dates indicating that some of them were delivered to him one minute before the others, he is bound by such indorsement, and will not be permitted to show that the deliveries were simultaneous.[89]

[85] Farquharson v. Ruger, 1 Cow. 215.

[86] Bachman v. Sulzbacher, 5 S. C. 58; Ex parte Stagg, 1 Nott & McC. 405. See, also sec. 5382 Glauque's Rev. Stats. Ohio 7th ed.

[87] State v. Hunger, 17 Neb. 216.

[88] Smith v. Lind, 29 Ill. 24; Adams v. Dyer, 8 Johns. 347, 5 Am. Dec. 344; Michaels v. Boyd, 1 Cart. 259; Burney v. Boyett, 1 How. (Miss.) 39; Reeves v. Johnson, 7 Halst. 33; Rockhill v. Hanna, 15 How. 189; Waterman v. Haskin, 11 Johns. 228; Ulrich v. Dreyer, 2 Watts, 303; Shirley v. Brown, 80 Mo. 244; Derrick v. Cole, 60 Ark. 394; Albrecht v. Long, 27 Minn. 81; Mygatt v. Tarbell, 78 Wis. 351.

[89] State v. Cisney, 95 Ind. 265.

Digitized by Google

§ 204. Liens of Executions from Federal Courts.—The various states have no power to enact laws regulating, in any respect, the procedure of the courts of the United States, nor prescribing or limiting the lien of any execution issuing from those courts. The United States government has the exclusive authority to enact and to interpret laws regulating the process of its courts. Such process is entirely free from the dominion of state laws, except so far as such laws have been adopted by congress or by the different federal courts.[90] The act regulating the procedure of the courts of the United States provides that "the party recovering a judgment in any common-law cause, in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."[91] It results, from this section, that whether executions from the federal courts shall be treated as liens from their teste, from their delivery, or from their levy, must be determined from inspection of such laws of the state wherein the writ is

[90] Wayman v. Southard, 10 Wheat. 1; Bank of United States v. Halstead, 10 Wheat. 51; Boyle v. Zacharlo, 6 Pet. 648; Beers v. Haughton, 9 Pet. 331; Ross v. Duval, 13 Pet. 45; United States v. Knight, 14 Pet. 301; Amis v. Smith, 16 Pet. 303; Massingill v. Downs, 7 How. 760; Corwin v. Benham, 2 Ohio St. 36; Carroll v. Watkins, 1 Abb. 474, Cropsey v. Crandall, 2 Blatchf. 341; Ward v. Chamberlain, 2 Black, 430; Freeman on Judgments, sec. 403.

[91] Desty's Federal Procedure, sec. 916.

Digitized by Google

issued as were in force at the passage of the section quoted, or have since been adopted by the courts in virtue of the powers conferred by that section. Cases of conflict frequently arise between writs issued by federal courts and delivered to the United States marshal, and writs issued by state courts and placed in the hands of officers of the state. Under such circumstances, the writ which is first levied thereby obtains precedence, and becomes entitled to satisfaction out of the proceeds of the property seized.[92] The rule seems to be universally recognized that, when two different tribunals have the concurrent right to seize upon property, that tribunal whose officers first accomplish a seizure obtains an exclusive jurisdiction over the property seized, which the other tribunal will not attempt to disturb.[93] If property is seized under process issued by one of the state courts, a national court will not attempt to deprive the seizing officer of its custody, nor will a state court undertake to dispossess an officer holding the property under process issued by any of the national courts. In either event, if the custody of the officer is wrongful, redress, so far as possession of the property is concerned, must be sought in the court whose officer has such possession. If, however,

[92] Pulliam v. Osborne, 17 How. 471; Brown v. Clarke, 4 How. 4; Williams v. Benedict, 8 How. 107; Logan v. Lucas, 59 Ill. 237; Hagan v. Lucas, 10 Pet. 400; Munson v. Harroun, 34 Ill. 422; Schaller v. Wickersham, 7 Cold. 376; Ruggles v. Simonton, 3 Biss. 325; Leopold v. Godfrey, 11 Biss. 158.

[93] Fox v. Hempfield R. R. Co., 2 Abb. 151; Riggs v. Johnson, 6 Wall. 197; Crane v. McCoy, 1 Bond. 422; Moore v. Withenburg, 13 La. Ann. 22; Johnson v. Bishop, 1 Woolw. 324; Bill v. N. A. Co., 2 Biss. 300; Bell v. Life & T. Co., 1 Biss. 260; Chapin v. James, 7 Chic. L. N. 33; U. T. Co. v. R. R. Co., 7 Chic. L. N. 33; Taylor v. Carryl, 20 How. 583; Peck v. Jenness, 7 How. 612; Smith v. McIver, 9 Wheat. 532; Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334; Plume etc. Co. v. Caldwell, 136 Ill. 163, 29 Am. St. Rep. 305.

Digitized by Google

the seizure was wrongful, any party injured is at liberty to seek redress in any form of action which will not interfere with the possession of the officer.[94]

§ 205. The Lien of an Execution does not Continue the Lien of a Judgment.—Lands, while bound by a judgment, are nevertheless so far the subjects of subsequent conveyance and encumbrance that such conveyance or encumbrance can only be destroyed by a sale of the property under the judgment made during the life of its lien. In many instances sales have been made by judgment debtors during the life of the judgment liens. Subsequently, and while the liens were still in force, executions have been taken out and levied, but no sales were made until after the time designated by law for the termination of the judgment lien. In Missouri it was held that the lien of the execution continued that of the judgment; and, therefore, that the execution sale divested all titles and liens acquired from the debtor subsequently to the judgment.[95] In all the other states, so far as we are aware, the decisions made upon this subject are in conflict with that made in Missouri, and affirm that a sale made after the expiration of a judgment lien is to be treated as though such lien had never existed.[96]

[94] Covell v. Heyman, 111 U. S. 176; Krippendorf v. Hyde, 110 U. S. 276; Freeman v. Howe, 24 How. 450; Plume etc. Co. v. Caldwell, 136 Ill. 63, 29 Am. St. Rep. 305, and note, 311.

[95] Bank of Missouri v. Wells, 12 Mo. 361.

[96] Tenney v. Hemenway, 53 Ill. 98; Gridley v. Watson, 53 Ill. 186; Trapnall v. Richardson, 13 Ark. 543; Rogers v. Druffel, 46 Cal. 654; Bagley v. Ward, 37 Cal. 121; Isaac v. Swift, 10 Cal. 81; Dickinson v. Collins, 1 Swan, 516; Roe v. Swart, 5 Cow. 294; Little v. Harvey, 9 Wend. 158; Tufts v. Tufts, 18 Wend. 621; Graff v. Kip, 1 Edw. Ch. 619; Pettit v. Shepherd, 5 Paige, 493; Rupert v. Dantzler, 12 Smedes & M. 697; Beirne v. Mower, 13 Smedes & M. 427; Davis v. Ehrman, 20 Pa. St. 258; Birdwell v. Cain, 1 Cold. 302; Shapard

Digitized by Google

§ 206. No Lien while the Writ is not being Executed in Good Faith.—By the statute of 13 Elizabeth, c. 5, executions taken out with intent to hinder, delay, or defraud creditors, or others, are, as against the persons sought to be hindered, delayed, or defrauded, utterly void.[97] The operation of this statute upon the lien of executions has been the subject of very frequent judicial decisions, and of occasional judicial dissension. According to a very considerable preponderance of the authorities, no actual intent to hinder, delay, or defraud any one need be shown. What was the intent is a conclusion to be drawn from the acts or words of the plaintiff in execution. If what he did or acquiesced in was of a character to hinder, delay or defraud other creditors of the defendant, his attempted use of the writ is, in contemplation of law, fraudulent, and hence no lien or other advantage can result therefrom as against such other creditors, nor even against innocent encumbrancers and purchasers.[98]

An execution and its lien may be avoided by such conduct on the part of the plaintiff as shows an improper use of his writ, though the motives influencing such conduct, instead of being fraudulent, were grounded in kindness and charity toward the defendant, and free from the slightest design to injure others. The only proper use of an execution is to enforce the collection of a debt, and to enforce it

v. Bailleul, 8 Tex. 26; Conwell v. Watkins, 71 Ill. 488; Pierce v. Fuller, 36 Hun, 179; Spicer v. Gambill, 93 N. C. 378.

[97] Smith's Leading Cases, 82; Bradley v. Wyndham, 1 Wils. 44; Snyder v. Hunkleman, 8 Pen. & W. 487; Matthews v. Warne, 6 Halst. 295; Williamson v. Johnston, 7 Halst. 86.

[98] Sweetzer v. Matson, 153 Ill. 568, 46 Am. St. Rep. 911; Keyser's Appeal, 13 Pa. St. 409, 53 Am. Dec. 487; Stroudburg Bank's Appeal 126 Pa. St. 523; Hunt v. Hooper, 12 Mees. & W. 664; 1 D. & L. 626.

Digitized by Google

with a considerable degree of diligence. To employ it for other objects is inconsistent with its nature, and such a perversion from its legitimate purposes as brings upon it the penalty prescribed by the statute of Elizabeth. The plaintiff in execution may desire to allow the defendant time in which to make payment, and yet may wish to save himself from all hazard arising from his delay to enforce the collection of his judgment. He is likely, therefore, to take out execution with a view of binding defendant's property, but with no intent to make any immediate levy or sale. In other words, he seeks to convert an execution into a mere mortgage. This the law does not tolerate. Whenever it can be shown that the object of the writ was merely to obtain better security for the debt, it is fraudulent as against subsequent purchasers or encumbrancers, and outranked by subsequent executions.[99] Rarely has this object been proclaimed by the plaintiff in execution. It is inferable from express direction to an officer not to proceed with a levy or a sale, or from any language or course of conduct from which the conclusion may fairly be drawn that the plaintiff did not intend to make his writ immediately productive, but rather to secure the advantage of a lien on the property of the defendant.[100] In one instance this conclusion appears to have been justified by the court on the ground that the character and condition of the personalty levied upon were such that it

[99] Davidson v. Waldron, 31 Ill. 121; Corless v. Stanbridge, 5 Rawle, 286; Freeburger's Appeal, 40 Pa. St. 244; Weir v. Hale, 3 Watts & S. 285; Smith's Appeal, 2 Pa. St. 331; Price v. Shipps, 16 Barb. 585.

[100] Speelman v. Chaffee, 5 Colo. 247; Williams v. Mellor, 12 Colo. 1; Gilmore v. Davis, 84 Ill. 487; Everingham v. National City Bank, 124 Ill. 527; Everingham v. Ottawa City Bank, 25 Ill. App. 637; Burleigh v. Piper, 51 Iowa, 649; Robertson v. Lawton, 91 Hun, 67.

Digitized by Google

was not reasonable to believe that the plaintiff intended to sell it during the life of his writ.[101] In this we cannot concur, for if property is subject to an execution, the plaintiff has a right to levy upon it at any time before the actual return day, and while the writ remains in the hands of the officer, and the levy may be made productive by taking out a venditioni exponas, or even by selling, in the absence of that writ, and after the execution has been returned.

The loss of the lien of the writ by the failure to proceed with its execution in good faith, or, in other words, by seeking to employ it as a mere security, or to prevent the property of the defendant from being seized by others, is based upon the assumption that it is a fraud against others, and, therefore, may be disregarded by them. Hence, if a person is so situated that the act or neglect of the plaintiff in this respect cannot operate as a fraud upon him, he is not within the rule, and cannot invoke its protection. Neither the defendant, nor any person acquiring title under him without the payment of a valuable consideration, could have been defrauded or otherwise prejudiced by the attempt to use the writ as a mere security, and hence neither can sustain a claim that it failed to create a lien, or that, after the creation of the lien, it was lost or suspended by directions not to proceed with the execution. "Liens of executions may be lost as against junior judgment creditors, mortgagees, or vendees acquiring rights during the time execution may be stayed by order of the plaintiffs. But as against the defendant in execution, or his personal representative or heirs, or others not acquiring rights or liens, the mere suspension of the execution has no effect on its

[101] Burleigh v. Piper, 51 Iowa, 649.

Digitized by Google

lien."[102] "The principle upon which such a lien is lost by mere suspension is that of delay by the plaintiff for the purpose of favoring the defendant in execution, at the expense of other creditors, whose diligence may be thus paralyzed and rendered of no avail. It is, therefore, justly confined to junior creditors, mortgagees, or vendees who acquire intervening rights during the time execution may be stayed by order of the plaintiff."[103]

"It is clear that mere delay on the plaintiff's part, in executing his judgment, will not affect his lien, as against the defendant in execution, his personal representative or heirs, who presumptively cannot be prejudiced by it. The principle upon which such a lien is lost by mere suspension is that of delay by the plaintiff for the purpose of favoring the defendant in execution at the expense of other creditors, whose diligence may be thus paralyzed and rendered of no avail. It is, therefore, justly confined to junior creditors, mortgagees, or vendees who acquire intervening rights during the time the execution may be stayed by order of plaintiff."[104] An assignee for the benefit of creditors, not being a bona fide purchaser for value, is in no better condition than his assignor to assail an execution lien on the ground of laches in enforcing the writ.[105]

In order to avoid a writ, as being issued for the purpose of security only, it must be shown that the plaintiff gave some direction to stay the execution of the writ, or did some other act from which it may be in-

[102] Dryer v. Graham, 58 Ala. 623; Duer v. Morrill, 20 Ill. App. 355.

[103] Keel v. Larkin, 72 Ala. 503.

[104] Keel v. Larkin, 72 Ala. 493.

[105] Griffin v. Wallace, 66 Ind. 410.

Digitized by Google

ferred that he did not intend to compel a sale.[106] Certainly the decisions do not intend that an express direction to the officer to whom the writ is delivered, not to proceed under it, must be proved, to sustain the inference that the plaintiff did not in good faith intend that it should be executed according to its mandate, but only that he is not chargeable with the negligence or inaction of the officer, where there has been nothing either in the words or conduct of the plaintiff to warrant the belief that the officer's want of diligence has been brought about by the plaintiff.[107]

The delivery of a writ to an officer, with directions not to levy, is equivalent to no delivery, and can create no lien.[108] A direction not to levy or not to sell, unless compelled to do so by younger executions, is conclusive that the writ is being used as a mere security, or to prevent other creditors from attempting to seize the same property. Viewed in either light, it is an unjustifiable use of the writ, and, until countermanded by a direction to proceed, operates as an entire suspension of the lien of the writ, whether a levy has been made or not.[109] "We believe the doctrine to be, as the object of an execution is to obtain satisfaction of the judgment on which it issues, on its delivery to the proper officer, it gives to the creditor a priority, be-

[106] Brown's Appeal, 26 Pa. St. 490; Benson v. Berry, 55 Barb. 620.

[107] Sweet v. Williams, 162 Pa. St. 94.

[108] Cook v. Wood, 16 N. J. L. 254; Syfers v. Bradley, 115 Ind. 345; Wunsch v. McGraw, 4 Wash. 72.

[109] Moore v. Fitz, 15 Ind. 43; Kimball v. Munger, 2 Hill, 364; Foster v. Smith, 13 U. C. Q. B. 243; Crane v. Clarke, Hil. T. 1828, N. B.; Hamilton v. Bryson, 12 N. B. 618; Hunt v. Hooper, 1 Dowl. & L. 626; 12 Mees. & W. 664; 8 Jur. 203; 13 L. J. Ex. 183; Pringle v. Isaac, 11 Price, 445; Dunderdale v. Sauvestre, 13 Abb. Pr. 116; Flick v. Troxsell, 7 Watts & S. 65; McClure v. Ege, 7 Watts, 74.

Digitized by Google

cause the law imposes the duty upon the officer to execute it without delay. Any act of the creditor, therefore, diverting the execution from this purpose, renders it inoperative against other creditors, and clothes them with priority. A delivery of such a writ to a sheriff, instructing him at the same time to do nothing under it, is really no delivery, and confers no rights upon the creditor. If a plaintiff in execution instructs the sheriff to make no levy until he gives him further orders, or until another day, it follows, if, in the mean time, an execution comes to the hands of an officer, with instructions to proceed, and he actually does proceed and make a levy, taking the property into his possession, this second execution is, and should be deemed, first in order; and the same is the rule if the direction is not to proceed to a levy unless urged by junior executions." [110] In other words, it is not the mere issuing or delivery of the writ which creates a lien, but an issuing and delivery for the purpose of execution.[111] The purposes of the execution, or whether it shall be enforced, cannot be left to the determination of the officer to whom it is delivered. The plaintiff himself must act either in person or by his agents, and for this purpose he cannot make the officer his agent, or, at all events, if he does so, he is bound by the officer's inaction, and is deemed to have directed it. Therefore, if a writ is delivered to a proper officer, who is told to use his discretion respecting the making of a levy, and he, for that reason, does not act, the writ must be treated as subordinate to subsequent writs in favor of other plaintiffs.[112]

[110] Gilmore v. Davis, 84 Ill. 489; Landis v. Evans, 113 Pa. St. 334; Howes v. Cameron, 23 Fed. Rep. 324.

[111] Smith v. Erwin, 77 N. Y. 471.

[112] Western etc. S. Co. v. Rose, 60 Ill. App. 452.

Digitized by Google

The execution of a writ for the purpose of making or keeping it effective as a lien cannot stop with a mere levy upon the property. If the officer is instructed by the plaintiff not to sell till further orders, the lien of the execution and levy becomes subordinate to that of any subsequent writ placed in the officer's hands for service.[113] It is also subordinate to any subsequent mortgage executed by defendant during a period when the writ is being held up or suspended.[114] But it is by no means essential, in order to postpone the lien of an execution, that the plaintiff's purposes should be made known by so unmistakable a direction as that just referred to. The lien of an execution is designed to assist the plaintiff while he is seeking to enforce his writ. If, at any time, he is shown not to be seeking such enforcement, then, during such time, he is without any execution lien, and is liable to lose the benefit of his writ through the sale or encumbrance of the defendant's property, or by the operation of a junior writ. He cannot avoid this result by showing that his intentions were meritorious, or that he knew of no other creditors. Whenever, by the plaintiff's orders, or by agreement between him and the defendant, the execution of the writ is suspended, by directions not to levy, or, after levy, by directions not to sell, whether such directions are permanent in their nature, or designed to operate only until further orders are given, then, according to a decided preponderance of the authorities, the lien is also suspended, and the execution becomes dormant.[115]

[113] Ala. Gold L. Ins. Co. v. McCreary, 65 Ala. 127.

[114] Burnham v. Martin, 54 Ala. 189.

[115] Ross v. Weber, 26 Ill. 221; Truitt v. Ludwig, 25 Pa. St. 145; Kellogg v. Griffin, 17 Johns. 274; Ball v. Shell, 21 Wend. 222; Bayly v. Burming, 1 Lev. 174; Kempland v. Macauley, Peake, 66; Eberle

Digitized by Google

There may probably be some delay in the service of the writ, caused by the plaintiff's directions, which will not impair its lien, provided it clearly appears that there was no intent to employ the writ as a mere security. On the day a writ issued, the plaintiff's attorney "told the sheriff's deputy not to go to defendant's house until the next day, as the house was torn up," and on the following morning informed the sheriff that the ladies were clearing up things in the house, and suggested that that officer might wait and go up in the afternoon. The court decided that the lien was not thereby lost nor suspended, because "it cannot be doubted that what was thus said and suggested by the plaintiff in the execution was prompted by a desire to accommodate the family of the defendant in the execution, and cannot be fairly construed as evidence of a design on his part to merely obtain a lien by virtue of his execution, and hold the same as security." [116] It has been said that "it would be a harsh doctrine to hold that, in a case where no other creditor was unduly postponed or otherwise injured, a creditor could not grant a humane indulgence to his debtor without losing his execution altogether." [117] In this case, however, the contest was between a sheriff and the executrix of the defendant in execution, and, as we have

v. Mayer, 1 Rawle, 366; Hickman v. Caldwell, 4 Rawle, 376; Berry v. Smith, 3 Wash. C. C. 60; Kauffelt's Appeal, 9 Watts, 334; Commonwealth v. Stremback, 3 Rawle, 341, 24 Am. Dec. 351; Porter v. Cocke, Peck. 30; Lowry v. Coulter, 9 Pa. St. 349; Wood v. Gary, 5 Ala. 43; Branch Bank v. Broughton, 15 Ala. 127; Wise v. Darby, 9 Mo. 131; Albertson v. Goldsby, 28 Ala. 711; Knower v. Barnard, 5 Hill, 377; Hickok v. Coates, 2 Wend. 419, 20 Am. Dec. 632; Rew v. Barber, 3 Cow. 272; Lovich v. Crowder, 8 Barn. & C. 132; 2 Moody & R. 84; Slocomb v. Blackburn, 18 Ark. 309; Mickle v. Planters' Bank, 4 How. (Miss.) 130.

[116] Landis v. Evans, 113 Pa. St. 335.

[117] Connell v. O'Neil, 154 Pa. St. 582.

Digitized by Google

already shown, she, because of her not being a purchaser or encumbrancer for value, was not entitled to invoke the rule here under consideration. There have, however, been cases in which, notwithstanding some stay of execution at the request of the plaintiff or by his permission, the courts have looked into the object of the stay, and have held that it did not impair the plaintiff's lien where it clearly appeared that his object was not to get security nor to hinder other creditors, but to accomplish some other result innocent in itself and not of a character to hinder or delay others.[118] We believe the better and safer rule is one which declines to enter into any investigation of the purposes of the plaintiff, and which pronounces his staying all active proceedings under his writ a waiver of his lien, though, in so doing, his only purpose was to grant some indulgence to the defendant. Speaking of postponements of sales with the consent of the plaintiffs in execution, the supreme court of Illinois said: "It matters not that the creditors were actuated by motives of kindness or leniency to their debtor, or that they had no actual intention to hinder or defraud other creditors; nor is it a controlling circumstance that the various postponements of the sale did not, as a matter of fact, hinder, delay, or defraud other creditors. Fraud arises from such abuse of the writs as a legal conclusion, and the consequence which the law imposes is to give to a junior execution coming into the hands of the sheriff during the pendency of such postponements a preference over the writs used for such fraudulent purpose." [119]

[118] Broadhead v. Cornman, 171 Pa. St. 322.

[119] Sweetzer v. Matson, 153 Ill. 568, 584, 46 Am. St. Rep. 584.

Digitized by Google

The plaintiff in the writ and the officer intrusted with its execution must necessarily be permitted to exercise a reasonable discretion in carrying it into effect. The plaintiff is not compelled to proceed at once to a sale, when, by so doing, he would defeat rather than promote the objects of the writ, or would unnecessarily and unreasonably impoverish the defendant. Hence, a reasonable adjournment of the sale does not render the writ dormant, provided it may still be executed before the return day.[120] So, where hides were levied upon in the autumn while tanning in a vat, and were, on that account, not in a fit condition to be sold until the next spring, it was held that the plaintiff did not waive the priority of his writ by directing that the sale be postponed till they were in condition to be sold.[121] If it appears, however, that several postponements of sale have been made for the benefit of the defendant in execution, to enable him to make some arrangement with his creditors, there is much reason for inferring that the writ was employed for purposes inconsistent with its nature, and that it was so perverted from its legitimate purposes as to render it fraudulent and void as against other creditors.[122]

An execution, when delivered to an officer, is presumed to have been delivered for service.[123] This presumption may, as we have shown, be rebutted by proving that the delivery was accompanied by directions staying the execution of the writ. In many instances the existence of such directions cannot be established

[120] Lantz v. Worthington, 4 Pa. St. 153, 45 Am. Dec. 682; Dancy v. Hubbs, 71 N. C. 424; Dougherty v. Logan, 70 N. C. 558; Childs v. Dilworth, 44 Pa. St. 123.

[121] Power v. Van Buren, 7 Cow. 560.

[122] Sweetzer v. Matson, 153 Ill. 568, 584, 46 Am. St. Rep. 911.

[123] Johnson v. Crocker, 9 N. B. 94.

Digitized by Google

by direct proof, and yet the manner in which the officer has conducted himself, and the lenity with which the plaintiff has viewed such conduct, indicate that the directions must have been given, or that by some means the officer and the plaintiff must have come to a mutual understanding to delay the execution of the writ. No doubt many cases may arise in which, from all the circumstances, the jury will be warranted in inferring directions for delay, though no direct proof can be produced.

An execution cannot become dormant without some fault on the part of the plaintiff. He is certainly not liable for the ordinary neglect of the officers with whom he intrusts his process.[124] And there are many cases in which the broad declaration is made that the plaintiff is not to be deprived of the benefit of his lien by his mere acquiescence in the delay of the officer, but only by his direction to stay the writ.[125] As the plaintiff is obliged to seek the assistance of officers of the law, who are not always the agents whom he would prefer if allowed his choice, and as they may be guilty of laches in which he may have no complicity, there is a manifest propriety in exempting him from the evil consequences of their inattention and neglect in ordinary circumstances. But he is not without means of compelling them to act with reasonable promptness. His neglect for a long period to employ those means is

[124] Leach v. Williams, 8 Ala. 759; Williams v. Mellor, 12 Colo. 1; Sweetser v. Matson, 153 Ill. 583, 46 Am. St. Rep. 915; Broadhead v. Cornman, 171 Pa. St. 322; Gillespie v. Keating, 180 Pa. St. 150, 57 Am. St. Rep. 622; Miller v. Getz, 135 Pa. St. 558, 20 Am. St. Rep. 887.

[125] McCoy v. Reed, 5 Watts, 300; Snipes v. Sheriff, 1 Bay, 295; Russell v. Gibbs, 5 Cow. 390; Benjamin v. Smith, 12 Wend. 404; Doty v. Turner, 8 Johns. 20; Herkimer Bank v. Brown, 6 Hill, 232; Thompson v. Van Vechten, 5 Abb. Pr. 458.

Digitized by Google

certainly either evidence of his complicity in the delay, or of gross laches in the discharge of his own business. While the property of the defendant remains in his possession, the lien of the execution is a secret lien, and, as such, it ought not to be favored in law. The property is liable to be sold by the defendant to purchasers for value, and without notice of the lien. The hardship of exposing such purchasers to liens during a diligent execution of the writ can hardly be justified. By what terms, then, can we adequately condemn the rule of law which, as against them, permits the indefinite continuance of the lien through the laches or acquiescence of plaintiffs? To the credit of the judiciary, let it be said that the rule that the mere acquiescence of the plaintiff in delay cannot render the lien dormant, has not been applied in extreme cases. In Ohio, a stallion, levied upon September 11, 1857, was left in possession of the defendant, who sold it November 3, 1858. The execution was held to be dormant as against this purchaser, because, as it was in the power of plaintiffs to have compelled a sale, they were guilty of laches in not doing so.[126] Similar principles were announced in Kentucky, where a sale of lands was delayed in one case for seventeen months,[127] and in another for three years; [128] and also in New York, where a cow was sold after an execution had lain for thirteen months in the sheriff's office without a levy.[129] It is manifestly impossible to state, as a matter of law, what delay in selling property levied upon must give rise to a conclusive presumption of the fraudulent use

[126] Acton v. Knowles, 14 Ohio St. 18.

[127] Owens v. Patteson, 6 B. Mon. 489, 44 Am. Dec. 780.

[128] Deposit Bank v. Berry, 2 Bush, 236.

[129] Bliss v. Ball, 9 Johns. 132. See Snyder v. Beam, 1 Browne, 366; Wood v. Keller, 2 Miles, 81.

Digitized by Google

of the writ. There are cases in which very considerable delay, though unexplained, in one instance extending over more than two years, and in another more than one year, has been held not to create such a presumption.[130] We cannot conceive how a delay of years, or even of months, after a levy, in selling property, is consistent with the purpose of making a bona fide use of the writ, or of employing it otherwise than as a mere security, or for the purpose of preventing property from being applied to the satisfaction of other creditors. A delay, however long, may be susceptible of explanation. In the absence of such explanation, the just inference is either that the levy and writ have been abandoned, or that the plaintiff employed them for an improper purpose, and the lien should be treated as at an end as against the claims of subsequent bona fide purchasers, encumbrancers, and other creditors seeking satisfaction under writs issued in their behalf.[131] From the rules stated in this section concerning the effect of a direction to stay executions, the courts of Delaware, New Jersey, and South Carolina dissent. In the first-named state, the plaintiff may safely instruct the sheriff not to proceed unless compelled by other judgment creditors;[132] in the second-named state, he may direct the officer not to sell till further orders;[133] while in the last-named state, a writ "lodged to bind" has precedence over a subse-

[130] Harman v. May, 40 Ark. 146; Terry v. Bank of Americus, 77 Ga. 528; Gillespie v. Keating, 180 Pa. St. 150, 57 Am. St. Rep. 622.

[131] Patterson v. Fowler, 23 Ark. 459; Ruker v. Womack, 55 Ga. 399; Cook v. Clements, 87 Ky. 566; Allen v. Levy, 59 Miss. 613; Mann v. Roberts, 11 Lea, 57.

[132] Janvier v. Sutton, 3 Harr. (Del.) 37; Hickman v. Hickman, 3 Harr. (Del.) 484.

[133] Cumberland Bank v. Hann, 4 Harr. (N. J.) 166.

Digitized by Google

quent writ "lodged to levy and sell." [134] In Delaware and New Jersey there is no inference that a writ is fraudulent, and the lien thereof destroyed or suspended from instructions for delay in its execution, but if, from all the attendant circumstances, the court or jury finds that the purpose of the writ is to hinder, delay, or defraud creditors, its lien cannot be enforced against them.[135] A stay of execution, made by the court, does not affect the execution lien.[136] After a levy has been made, the property may be left in the possession of the defendant, under an agreement that it shall be forthcoming at the day of sale. When and in what circumstances this may operate as a postponement of the writ, in favor of subsequent purchasers or of junior writs, will be considered in the chapter on the levy of executions. Granting the defendant indulgence, or issuing a writ without intent to execute it, does not impart to plaintiff's claim a permanently fraudulent character. The writ may be returned and an alias issued on the same judgment. If so, the lien of the latter is not impaired by the laches in executing the former.[137] Even with respect to the original writ, it seems that if the plaintiff, after staying or suspending its execution, directs the officer to proceed, the lien will be revived and made paramount to all writs received by the officer after such direction to proceed.[138]

If an execution issues upon a judgment which, by

[134] Greenwood v. Naylor, 1 McCord, 414.

[135] State v. Records, 5 Harr. (Del.) 146; Cumberland v. Hann, 19 N. J. L. 166; Caldwell v. Fifield, 24 N. J. L. 150; Fischel v. Keer, 45 N. J. L. 507.

[136] Bain v. Lyle, 68 Pa. St. 60.

[137] Huber v. Schnell, 1 Browne, 16; Arrington v. Sledge, 2 Dev. 359; Roberts v. Oldham, 63 N. C. 297.

[138] Freeburger's Appeal, 40 Pa. St. 244; Hatch v. Jerrard, 69 Me. 355.

Digitized by Google

law, constitutes a lien upon real property, and is levied upon property of that class, the plaintiff in execution may be regarded as having the protection of three liens, the first created by the judgment, the second by the delivery of the writ to an officer, and the third by his levy thereof upon the real property. The lien created by the judgment is not, however, dependent either upon the issuing or the delivery or levy of the writ, but continues during the period of time within which the judgment lien remains operative by statute, irrespective of any want of diligence on the part of the judgment creditor in issuing and enforcing his writ. The fact that he agrees not to take out execution for a designated time, or, after taking it out, not to levy it, or, after levying, not to make a sale, does not deprive him of the benefit of the judgment lien. He may, hence, notwithstanding such agreement, sell the property at any time within the life of the judgment lien, and the title of the purchaser at the sale is not impaired by the fact that the execution lien may have been destroyed, for, disregarding such lien, the judgment lien alone is ample to authorize the sale and to sustain the title of the purchaser thereunder.[189]

§ 207. Not Destroyed During the Life of the Writ, Except by Fault of Plaintiff.—Except where lost by abandonment of the levy, or by the fault of the plaintiff in staying the execution of the writ, or in making some use of it actually or constructively fraudulent, the lien of an execution seems not to be lost, except by some matter which is sufficient to deprive the writ of all further vitality. No act of the defendant can, as a gen-

[189] Marshall v. Moore, 36 Ill. 321; Ludeman v. Hirth, 96 Mich. 17, 35 Am. St. Rep. 588; Slattery v. Moore, 36 Ill. 321.

Digitized by Google

eral rule, defeat or impair the lien.[140] Hence, as has been heretofore stated, the lien is not lost by his removing the property to another county.[141] The same rule has been applied to the removal of the property to another state.[142] If property which has become subject to an execution is first removed to another county or state, and afterward returned to the county in which the lien attached, there is no difficulty or hardship in maintaining that it continues intact against the defendant in execution and also against others who are not purchasers for value without notice of the lien, and whose equities are, therefore, not more persuasive than are his. There is no doubt, if the property is kept out of the state so long that one in the state to which it was taken acquires a prescriptive title to it in that state, that the property vests in him, and cannot be taken from him under the lien of the execution on return of the property to the state wherein the lien arose.[143] If property which has been subject to a chattel mortgage is removed to another state, where the mortgage is not recorded, there are decisions affirming,[144] and others denying,[145] that it remains subject to the mortgage lien, notwithstanding it is no longer in the state where the lien was created. Perhaps the courts maintaining that a lien of this character may have an extraterritorial operation may reach the same conclusion respecting the lien of an execution. If chattels which are subject to an execu-

[140] Couchman v. Maupin, 78 Ky. 33.

[141] Street v. Duncan, 117 Ala. 571; Mitchell v. Ashby, 78 Ky. 254; see, also, Phegley v. Steamboat, 33 Mo. 461, 84 Am. Dec. 57.

[142] McMahan v. Green, 12 Ala. 71, 46 Am. Dec. 242.

[143] Newcombe v. Leavitt, 22 Ala. 631.

[144] Handley v. Harris, 48 Kan. 606, 30 Am. St. Rep. 322; Hornthal v. Burwell, 109 N. C. 10, 26 Am. St. Rep. 556.

[145] Corbett v. Littlefield, 84 Mich. 30, 22 Am. St. Rep. 681.

Digitized by Google

tion lien are removed to another county, and there levied upon and sold under another execution, the inclination of the courts is to protect the title of the purchaser, and to maintain that the plaintiff under the senior execution is entitled to the proceeds of the sale made in the county to which the chattels were removed.[146]

The execution itself is dependent on the judgment, and must be destroyed or suspended by whatever destroys or suspends the judgment. The lien of the writ is therefore destroyed by the reversal or satisfaction of the judgment. The temporary satisfaction of the judgment operates as a temporary suspension of the lien. The revival of the judgment, while it might revive the lien, could not do so to the prejudice of intermediate purchasers or encumbrancers. Taking the defendant in execution is, for the time being, a satisfaction of the judgment, and, therefore, must necessarily suspend the execution lien.[147] A levy upon personal property sufficient to satisfy a writ operates as a conditional satisfaction. This result does not follow the levy upon real property. Therefore, such a levy does not release or suspend the lien of an execution. It is neither a conditional satisfaction, nor is it evidence of an election on the part of the plaintiff in the writ to rely solely upon real property, and hence to waive his lien against the personal estate of his debtor.[148]

[146] McMahan v. Green, 12 Ala. 71, 46 Am. Dec. 242; Lambert v. Paulding, 18 Johns. 311.

[147] Rockhill v. Hanna, 15 How. 189; Snead v. McCoull, 12 How. 407; Cohen v. Grier, 4 McCord L. 569; Lynch v. Hanahan, 9 Rich. L. 186.

[148] Deloach v. Myrick, 6 Ga. 410; Everingham v. Ottawa City Bank, 25 Ill. App. 637; Everingham v. National City Bank, 124 Ill. 527.

Digitized by Google

A forthcoming bond is, in some states, considered as a satisfaction of the writ, and hence as a suspension of the execution lien.[149] A similar effect is produced by replevying an execution, "for by replevying the debt the execution becomes satisfied, and it would be preposterous to suppose that a lien, created for the purpose of discharging an execution, could continue to exist after the execution itself is satisfied."[150] But in other states a forthcoming bond,[151] or a bond given to stay execution,[152] does not satisfy the writ, and hence it does not destroy the lien. If property is taken from the officer in a replevin suit, bond being given for its return if the suit results in his favor, neither the bond nor the temporary loss of possession destroys the execution lien. If the suit terminates in his favor, the officer must retake the property, and sell it under his writ,[153] and cannot justify a levy made thereon by him, under a junior writ, nor the application thereto of the proceeds of the sale.[154]

If there are two or more executions in an officer's hands, under which a levy has been made, and the officer requires a bond of indemnity, which the holder of the senior writ refuses to give, and the holder of

[149] Brown v. Clark, 4 How. 4; King v. Terry, 6 How. (Miss.) 513; Witherspoon v. Spring, 3 How. (Miss.) 60; Bank of United States v. Patton, 5 How. (Miss.) 200; Parker v. Dean, 45 Miss. 408; Malone v. Abbott, 3 Humph. 532.

[150] Harrison v. Wilson, 2 A. K. Marsh. 547.

[151] Campbell v. Spruce, 4 Ala. 543; Doremus v. Walker, 8 Ala. 194, 42 Am. Dec. 634; Babcock v. Williams, 9 Ala. 150; Branch Bank v. McCollum, 20 Ala. 280.

[152] Branch Bank v. Curry, 13 Ala. 304; Brush v. Seguin, 24 Ill. 254; Lantz v. Worthington, 4 Pa. St. 153, 45 Am. Dec. 682; Sedgwick's Appeal, 7 Watts & S. 260; Hastings v. Quigley, 4 Pa. L. J. 220.

[153] Ferguson v. Williams, 3 B. Mon. 304, 39 Am. Dec. 466.

[154] Cox v. Currier, 62 Iowa, 551; Bowman v. Nelson F. N. B., 36 Neb. 117.

Digitized by Google

the junior writ gives, the latter, by a statute of Alabama, obtains precedence over the holder of the elder writ.[155] In Pennsylvania, while an officer held property under three writs, a bond of indemnity was required. It was given by the holder of the junior writ, and refused by the others. The officer thereafter proceeded to sell the property under all the writs. It was held that the senior writs had not lost their priority, and must first be satisfied, because there was no statute giving precedence to the giver of the bond of indemnity, and because, while the officer might have abandoned his levies under the senior writs, he had not done so.[156] But, if, on the refusal of the holder of a writ to give a bond of indemnity, the officer surrenders possession of the property to the claimant, the lien of the execution ceases to operate. Upon the subsequent giving of the bond, the officer may again take the property to satisfy the writ; but he cannot do so to the prejudice of rights acquired while the claimant was in possession.[157]

In some of the states, the right of an officer to demand indemnity is denied. In such states the refusal to give a bond of indemnity does not affect the rights of the plaintiff to the fruits of the execution, and therefore, cannot impair its lien.[158] The better rule seems to be, that if, after a levy upon property, a claim is made thereto by a stranger to the writ, in consequence of which the sheriff demands a bond of indemnity, before proceeding further, and some of the plaintiffs give such bond and others do not, the latter are

[155] Pickard v. Peters, 8 Ala. 493.

[156] Girard Bank v. P. & N. R. R. Co., 2 Miles, 447.

[157] Otey v. Moore, 17 Ala. 280, 52 Am. Dec. 173; Cotten v. Thompson, 25 Ala. 671.

[158] Adair v. McDaniel, 1 Bail. 158, 19 Am. Dec. 664.

Digitized by Google

estopped from claiming the proceeds of the sale of the property by their refusal to indemnify the officer from the consequences of retaining such property, and making the sale.[159]

An execution lien extends to property conveyed by the defendant for the purpose of hindering or defrauding his creditors, and may be made productive by a sale of the property under the writ, and without seeking the aid of chancery. Other creditors of the same defendant may prefer to obtain the aid of equity, and, before proceeding at law, may seek by a creditor's bill to remove, or have declared void, the fraudulent obstruction which the debtor has placed in their way. By so doing, they cannot destroy or obtain any precedence over a pre-existing execution lien. That lien is perfect at law. "A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable; and whenever there is a direct rule of law governing the case in all its circumstances, the court is as much bound by it as would be a court of law, if the controversy were there pending. The court comes as an auxiliary to give effect to and render more available legal liens, not to displace them, nor to subvert the order of priority which the law has established." [160] If, on the other hand, the holder of the senior lien files his bill to remove fraudulent obstructions, such lien is not lost by the delay required for the successful prosecution of his suit.[161] The suspension or delay of plaintiff's proceedings, resulting from an order of

[159] Smith v. Osgood, 46 N. H. 178; Burnett v. Handley, 8 Ala. 685; post, § 275.

[160] Mathews v. Mobile M. Ins. Co., 75 Ala. 90.

[161] Shepherd v. Woodfolk, 10 Lea, 593.

Digitized by Google

court, not obtained at his instance, does not destroy his lien. When such suspensive order terminates, or is vacated, he may proceed, and in so proceeding, is entitled to the benefit of the lien, existing in his favor, when his progress was arrested by such order. Otherwise he would be deprived of a valuable right, and without means of legal redress. And the general rule is, that the plaintiff, while guilty of no fault or neglect on his part, will not be deprived of his lien "without at least having a full remedy against the sheriff, or some other officer, on his official bond."[162] It is well settled that an execution lien cannot be displaced by subsequent proceedings, under statutes relating to bankrupts. The rights of the assignee of a bankrupt debtor are always subordinate to all judgment[163] and execution liens to which the bankrupt's estate was subject when the petition in bankruptcy was filed. Such liens can be avoided only by showing that they were obtained in pursuance of a purpose to avoid or delay the operation of such statutes; and this purpose will not be inferred merely from the fact that the debtor did not defend the action, or that he was known to be in an insolvent condition.[164]

[162] Kightlinger's Appeal, 101 Pa. St. 546.

[163] Witt v. Hereth, 8 Chic. L. N. 40, 13 Nat. Bank. Reg. 106, 6 Biss. 474; Webster v. Woolbridge, 3 Dill. 74; In re Weeks, 4 Nat. Bank. Reg. 364; Meeks v. Whatley, 10 Nat. Bank. Reg. 501; Haworth v. Travis, 13 Nat. Bank. Reg. 145; In re Hambright, 2 Nat. Bank. Reg. 502; Reed v. Bullington, 11 Nat. Bank. Reg. 408; Phillips v. Bowdoin, 14 Nat. Bank. Reg. 43; Winship v. Phillips, 14 Nat. Bank. Reg. 50.

[164] Mays v. Fritton, 20 Wall. 414; 11 Nat. Bank. Reg. 229; Wilson v. City Bank of St. Paul, 17 Wall. 473; 6 Chic. L. N. 149; 9 Nat. Bank. Reg. 97; 1 Am. L. T., N. S., 1; In re Weamer, 8 Nat. Bank. Reg. 527; Haworth v. Travis, 13 Nat. Bank. Reg. 145; In re Fuller, 4 Nat. Bank. Reg. 29; In re Smith, 1 Nat. Bank. Reg. 599; In re McGilton, 7 Nat. Bank. Reg. 294; Whithed v. Pilsbury, 13 Nat. Bank. Reg. 249; Swope v. Arnold, 5 Nat. Bank. Reg. 148; Goddard v.

Digitized by Google

Under the statutes of the United States, authorizing proceedings in bankruptcy and insolvency, and of the various states upon the subject, which latter are, of course, enforceable only during the time that the former are inoperative, execution and judgment liens were left unimpaired, except when subject to attack as forbidden preferences, though procured or suffered immediately preceding the institution of bankruptcy proceedings. The bankruptcy act of 1898, however, places execution liens upon substantially the same footing as liens created by attachment. That act differs from former acts upon this subject. Section 67 thereof provides as follows:

"Liens.—a. Claims which, for want of record, or for other reason, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

Weaver, 6 Nat. Bank. Reg. 440; Bernstein's Case, 2 Ben. 44; Wilson v. Childs, and Anshutz v. Campbell, 8 Nat. Bank. Reg. 527; In re Black, 2 Nat. Bank. Reg. 171; In re Kerr, 2 Nat. Bank. Reg. 388; Marshall v. Knox, 8 Nat. Bank. Reg. 97; Appleton v. Bowles, 9 Nat. Bank. Reg. 354; Smith's Case, 2 Ben. 432; 1 Nat. Bank. Reg. 599; Reeser v. Johnson, 76 Pa. St. 313; 10 Nat. Bank. Reg. 467; Fehley v. Barr, 66 Pa. St. 196; Chadwick v. Carson, 78 Ala. 116; In re Weeks, 4 Nat. Bank. Reg. 116. See, also, Matter of Campbell, 7 Am. Law Reg., N. S., 100; Campbell's Case, 1 Abb. 188; In re Burns, 7 Am. Law Reg. 105; Ex parte Donaldson, 7 Am. Law Reg. 213; Scott's Case, 1 Abb. 336; Sharman v. Howell, 40 Ga. 257, 2 Am. Rep. 576; In re Hufnagel, 12 Nat. Bank. Reg. 554; In re Hughes and Son, 11 Nat. Bank. Reg. 452; Appleton v. Bowles, 6 Chic. L. N. 192. The same rule prevailed under preceding bankrupt acts, except that it applied to attachment as well as to execution liens. Ingraham v. Phillips, 1 Day, 117; Franklin Bank v. Batchelder, 23 Me. 60; Davenport v. Tilton, 10 Met. 320; Kittredge v. Warren, 14 N. H. 509; Kittredge v. Emerson, 15 N. H. 277; Buffum v. Seaver, 16 N. H. 160; Vreeland v. Bruen, 1 Zab. 214; Wells v. Brander, 10 S. & M. 348; Downer v. Brackett, 21 Vt. 599; Rowell's Case, 21 Vt. 620. The rights of the holder of an execution lien were denied in In re Tills and May, 11 Nat. Bank. Reg. 214.

Digitized by Google

"c. A lien created by, or obtained in, or pursuant to, any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if (1) it appears that the lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference; or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy; or (3) that such lien was sought and permitted in fraud of the provisions of this act; or, if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien, and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done, had not bankruptcy proceedings intervened.

"f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, at-

Digitized by Google

tachment, or other lien shall be preserved for the benefit of the estate; and, thereupon, the same may pass to, and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry."

These provisions leave the law in great uncertainty, in which condition it must remain until they have been construed by the national courts of last resort. In the first place, it is made clear by the statute that the assignee of a bankrupt occupies as against every lien as favorable a position as if he were a creditor, and, hence, that a lien by execution, which, for some cause, has become nonenforceable against the creditors of a bankrupt, is equally nonenforceable against his assignee. In the second place, as to the liens created within four months before the inception of the bankruptcy proceedings, subdivision C indicates that they remain unaffected, except when given or suffered with knowledge of the insolvency or contemplated insolvency of the debtor, and with a view of preferring him to other creditors, and thus perpetrating "a fraud on the provisions of the act." Subdivision F, however, appears to avoid all execution and other liens obtained as a result of legal proceedings within four months prior to the filing of a petition for or against the bankrupt, reserving the rights of bona fide purchasers for value, whose titles have been acquired "without notice or reasonable cause for inquiry." Re-

Digitized by Google

specting the protection thus extended to bona fide purchasers, it is not clear whether in that term are included persons who have purchased the debt to secure which the lien exists, or persons who have, at a sale made under the lien, purchased some part or all of the property, subject thereto. It is a fair inference, from the language used in the statute, that the adjudication of the bankruptcy of a judgment debtor avoids all execution and judgment liens against him suffered within four months prior to the filing of the petition, with the exception that if any sale has been made under execution to enforce such a lien, the title of the purchaser is not impaired, if at the time of his purchase he was not chargeable with notice of the insolvency or contemplated insolvency of the debtor, and that the proceeding to divest his title was prosecuted or suffered in fraud of the provisions of the act.[165]

[165] In re Brown, 91 Fed. Rep. 358.

Note.—Concerning the Right to Prosecute Liens after Proceedings in Bankruptcy have been Instituted.—It must be remembered it does not necessarily follow, because property is charged with a valid lien, that such lien can be made productive by proceedings in the state courts. The respective authority of the state and federal courts, in the enforcement of such liens, has been the subject of a vast amount of judicial dissension, and has occasioned the most irreconcilable decisions and the most distressing doubts. On the one side, the claim was made that the federal courts proceeding in bankruptcy have exclusive jurisdiction over all the estate of the bankrupt, and all liens thereon; that the holder of the lien must in all cases present his claim against the bankrupt to the tribunal having charge of the bankruptcy proceedings; and either have his lien satisfied out of the proceeds of the estate when realized in that tribunal, or else seek permission to proceed in the state courts. In re Bridgeman, 2 Nat. Bank. Reg. 312; In re Bigelow, 1 Nat. Bank. Reg. 632; In re Bowie, 1 Nat. Bank. Reg. 628; Blum v. Ellis, 8 Chic. L. N. 163; 13 Nat. Bank. Reg. 345; In re Ruehle, 2 Nat. Bank. Reg. 577; In re Frizelle, 5 Nat. Bank. Reg. 122; In re Cook and Gleason, 3 Biss. 116; In re Vogel, 2 Nat. Bank. Reg. 427; Stuart v. Hines, 6 Nat. Bank. Reg. 416; In re Hufnagel, 12 Nat. Bank.

Digitized by Google

Reg. 556; In re Whipple, 13 Nat. Bank. Reg. 373; In re Brinkman, 7 Nat. Bank. Reg. 421; Davis v. Anderson, 6 Nat. Bank. Reg. 145. In some instances, proceedings for the enforcement of liens, carried on in the state courts, though in the absence of any special inhibition of the courts of bankruptcy, have been declared void. Phelps v. Sellick, 8 Nat. Bank. Reg. 390; Stemmons v. Burford, 39 Tex. 352; Davis v. Anderson, 6 Nat. Bank. Reg. 145. But certainly the state courts are not so entirely without jurisdiction as to render their proceedings absolutely void. If a tribunal has no jurisdiction over a subject-matter, it is impossible, even by the consent of the parties in interest, to confer any validity on the judgments or orders of such tribunal. Freeman on Judgments, § 120. But if the assignee of a bankrupt submits his rights in regard to the enforcement of a lien or the distribution of the proceeds of a sale to a state court, he is bound by its decision. Mays v. Fritton, 11 Nat. Bank. Reg. 229; 20 Wall. 414; Augustine v. McFarland, 13 Nat. Bank. Reg. 7; Scott v. Kelley, 12 Nat. Bank. Reg. 96. Where a sale has been made under proceedings in a state court to enforce a lien, and the property brings its value, the bankruptcy court will generally refuse to interfere, for the reason that no advantage could accrue to the creditors of the bankrupt from such interference. In re Hufnagel, 12 Nat. Bank. Reg. 556; In re Iron Mountain Co., 4 Nat. Bank. Reg. 645; In re Fuller, 4 Bank. Reg. (quarto) 29; 1 Saw. 243; In re Bowie, 1 Nat. Bank. Reg. 628; In re Lambert, 2 Nat. Bank. Reg. 426; Lee v. German Association, 3 Nat. Bank. Reg. 218. The right of the tribunal having jurisdiction of the bankrupt's estate to compel the claimants of liens to adjudicate their claims before it is not seriously questioned. Hence, such claimants have frequently been enjoined from proceeding further in the state courts. Kerosene Oil Co., 3 Nat. Bank. Reg. 125; 3 Ben. 35; 6 Blatchf. 521; In re Mallory, 6 Nat. Bank. Reg. 22; Jones v. Leach, 1 Nat. Bank. Reg. 595; In re Shuey, 6 Chic. L. N. 248; Witt v. Hereth, 5 Chic. L. N. 41; 13 Nat. Bank Reg. 106; In re Lady Bryan Mining Co., 6 Nat. Bank. Reg. 252; Samson v. Clark, 6 Nat. Bank. Reg. 403; In re Hufnagel, 12 Nat. Bank. Reg. 556; In re Whipple, 13 Nat. Bank. Reg. 373. And sales made without permission have either been vacated, or the claimants who proceeded have been held responsible for the value of the property sold, regardless of the price realized. Davis v. Anderson, 6 Nat. Bank. Reg. 145; In re Rosenberg, 3 Nat. Bank. Reg. 130; Smith v. Kehr, 7 Nat. Bank. Reg. 97.

But supposing that the lienholder chooses to rely upon his lien, and the bankruptcy court does not enjoin him from proceeding, nor in any other manner bring him before it, and undertake to adjudicate upon his rights. May he, in such circumstances, lawfully proceed in the state courts until the bankruptcy courts command him to desist? The cases which were first cited in this note insist that all the debts due from the bankrupt must be proved against his

Digitized by Google

estate, and that the holders of liens cannot make them productive except by proceedings either in the bankruptcy court, or having the express sanction of that court. The pretensions of these cases must be very materially abated, if not altogether denied. It is now settled that if an execution has been issued and levied, the officer making the levy may, notwithstanding the subsequent bankruptcy of the defendant, proceed to sell the property, and that the bankruptcy courts will not, in ordinary circumstances, interfere with his possession, nor enjoin his proceedings. The rights of the assignee are limited to the proceeds of the sale remaining in the hands of the officer after the plaintiff in execution has been satisfied. In re Weamer, 8 Nat. Bank. Reg. 527; Marshall v. Knox, 8 Nat. Bank. Reg. 97; 16 Wall. 551; In re Bernstein, 1 Nat. Bank. Reg. 199; 2 Ben. 44; Allen v. Montgomery, 48 Miss. 101; Thompson v. Moses, 43 Ga. 383; Jones v. Leach, 1 Nat. Bank. Reg. 595; Maris v. Duron, 1 Brewst. 428; In re Wilbur, 3 Nat. Bank. Reg. 276; 1 Ben. 527. It is also too well established to admit of doubt that if property has been attached on mesne process more than four months prior to the commencement of the proceedings in bankruptcy, the state court may make the attachment lien productive by ordering a sale of the property. Doe v. Childress, 21 Wall. 642; Stoddard v. Locke, 43 Vt. 574; Daggett v. Cook, 37 Conn. 341; Hatch v. Seely, 13 Nat. Bank. Reg. 380; Bates v. Tappan, 99 Mass. 376; 3 Nat. Bank. Reg. 647; Leighton v. Kelsey, 57 Me. 85; 4 Nat. Bank. Reg. 471; Batchelder v. Putnam, 13 Nat. Bank. Reg. 404; Brandon M. Co. v. Frazer, 13 Nat. Bank. Reg. 365; Rowe v. Page, 13 Nat. Bank. Reg. 366; Bowman v. Harding, 56 Me. 559; 4 Nat. Bank. Reg. 20; Gibson v. Green, 45 Miss. 218. In Pennsylvania the state courts are considered competent to enforce liens by action. Keller v. Denmead, 68 Pa. St. 449; Biddle's Appeal, 68 Pa. St. 13; 9 Nat. Bank. Reg. 144. In Iowa, actions may be brought to foreclose mortgages if the assignee takes no steps to redeem, and the mortgagor has not, by the presentation of his claim, submitted his lien to the jurisdiction of the court of bankruptcy. McKay v. Funk, 37 Iowa, 661; 13 Nat. Bank. Reg. 334; Brown v. Gibbons, 37 Iowa, 654; 13 Nat. Bank. Reg. 407. See, also, Reed v. Bullington, 11 Nat. Bank. Reg. 408; Wicks v. Perkins, 13 Nat. Bank. Reg. 280. There are some other cases which, we think, warrant the lienholder in proceeding till arrested by the direct action of the bankruptcy court. In re Davis, 8 Nat. Bank. Reg. 167; 1 Saw. 260; Davis v. R. R. Co., 13 Nat. Bank. Reg. 258; Myer v. C. L. P. & P. W., 8 Chic. L. N. 197; Baum v. Stern, 1 Rich., N. S. 415; Lenihan v. Haman, 6 Chic. L. N. 63; In re Donaldson, 1 Nat. Bank. Reg. 181; 1 L. T. B. 5; 7 Am. Law Reg. 213. But it is said that though a judgment is conceded to be a valid lien on real estate, no sale can be made under such judgment unless a levy was made before the commencement of the proceedings in bankruptcy. Jones v. Leach, 1 Nat. Bank. Reg. 595; Pennington v.

Digitized by Google

Sale, 1 Nat. Bank. Reg. 572; Turner v. The Skylark, 6 Chic. L. N. 239; Davis v. Anderson, 6 Nat. Bank. Reg. 145.

We are unable to discover any provision of the bankrupt law depriving the holder of a judgment lien from making the same productive by process issued out of the state court, and confined to the subject of the lien. The right to sell under a judgment lien has been upheld in Pennsylvania. Reeser v. Johnson, 10 Nat. Bank. Reg. 467; 76 Pa. St. 313; Fehley v. Barr, 66 Pa. St. 196. Of similar import, as we understand them, are the decisions under the bankrupt act of 1841. Russell v. Cheatham, 8 Smedes & M. 703; Talbert v. Melton, 9 Smedes & M. 27; Savage v. Best, 3 How. 118; Peck v. Jenness, 7 How. 612. The supreme court of the United States has always exhibited a tendency to modify the pretensions of the subordinate courts, when they were seeking to unduly extend the operation of the bankrupt law. The decision in the case of Eyster v. Gaff, reported in 8 Chic. L. N. 117, shows that a mortgagor who has procured a decree of foreclosure may proceed to sell the property after the mortgagee has been declared a bankrupt. In this case it was shown that a suit to foreclose the mortgage had been instituted in 1868. In May, 1870, the mortgagee filed his petition in bankruptcy. Thereafter, in July of the same year, a decree of foreclosure was entered, the assignee not having been made a party to the suit. A sale was made under this decree. The purchaser, in due time, brought his action to recover possession of the property, and was resisted on the ground that the decree and sale were void. The decree and sale were sustained. Justice Miller, delivering the opinion of the court, said: "It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceeding in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court, in the case before us, had acquired jurisdiction of the parties, and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree, as between the parties before it, until, by some proper pleadings in the suit, it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain that if, at any stage of the proceedings, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made

Digitized by Google

a party or to take part in the case, deserved no attention and received none. In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters, at one time, that the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act, not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction; and that other courts can proceed no further in suits of which they had, at that time, full cognizance. And it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property, or of contracts, into the bankrupt court, by the service of a rule to show cause and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts. These propositions are supported by the following cases, decided in this court: Smith v. Mason, 14 Wall. 419; Marshall v. Knox, 16 Wall. 551; Mays v. Fritton, 20 Wall. 414; Doe v. Childress, 21 Wall. 642. See, also, Johnson v. Bishop, Woolw. 824."

Digitized by Google

CHAPTER XIV.

OF PROPERTY EXEMPT FROM EXECUTION.

FIRST.—GENERAL PRINCIPLES APPLICABLE TO THE EXEMPTION LAWS.

§ 208. Exemption laws are liberally construed.
§ 209. Extraterritorial force of exemption laws.
§ 210. Exemption laws, to what extent in force in the federal courts.
§ 211. Whether the benefit of the exemption must be claimed by the defendant.
§ 212. Claiming the right of exemption.
§ 212a. Claiming the right of selection.
§ 213. Listing, scheduling, and appraising exempt property.
§ 214. Waiver of exemption rights.
§ 214a. Forfeiture of exemption rights.
§ 215. Consequences of officers disregarding claim for exemption.
§ 215a. Actions when debtor's claim for exemption is denied.
§ 215b. Measure of damages and the right to setoff.
§ 216. Agreements to waive benefit of exemption laws.
§ 217. Against what debts the exemption laws prevail.
§ 218. Sale and encumbrance of exempt property by its owner.
§ 219. Constitutionality of exemption laws as against prior debts.

SECOND.—OF THE PERSONS ENTITLED TO EXEMPTION.

§ 220. Exemption laws apply to all inhabitants.
§ 221. Cotenants and copartners.
§ 222. Heads of families.
§ 223. Householders.
§ 224. Teamsters and agriculturists.
§ 225. Persons exercising two or more trades.

THIRD.—OF VARIOUS CLASSES OF EXEMPT PROPERTY.

§ 226. Tools, what exempt as.
§ 226a. Implements and utensils, what exempt as.
§ 227. Teams, what exempt as.
§ 228. Wagons, what exempt as.
§ 229. Horses, what exempt as.
§ 230. Cows, what exempt as.

Digitized by Google

§ 231. Household furniture, what exempt as.
§ 232. Wearing apparel, what exempt as.
§ 233. Provisions for family use and feed for stock.
§ 234. Wages and earnings of the defendant.
§ 234a. Pensions.
§ 234b. Life insurance.
§ 235. Proceeds of exempt property.
§ 236. Property exempt because essential to the use of other exempt property.
§ 236a. Exemption of food, provisions, etc.
§ 236b. Exemption of stock in trade.
§ 236c. Exemptions not confined to specific articles.
§ 237. Miscellaneous exemptions.
§ 238. Continuance of exemption after death of the owner.

FIRST.—GENERAL PRINCIPLES APPLICABLE TO EXEMPTION LAWS.

§ 208. Exemption Laws should be Liberally Construed.—Under the common law and the early English statutes, the obligation of the debtor to discharge his liabilities was deemed to be paramount to every consideration of benevolence and humanity. If unable to satisfy his obligations, he was placed within control of his creditors so absolutely that not only his property, but also his person, could be taken and held under execution. The law was as cruel as Shylock. Like him, it listened to no appeals for mercy, but insisted upon the satisfaction of the exact terms of the bond. True, it stopped short of the direct taking of human life, and the direct drawing of human blood; but it never hesitated to deprive the debtor of all liberty of person, and to impair his health and spirits, and shorten his life, by confinement within the narrow limits and foul atmosphere of its ill-kept prisons. It was scarcely less cruel to his family. For, while it allowed them a scanty supply of wearing apparel, it left them no home, no tools or implements of husbandry, no food, and no means of obtaining a subsistence. It punished the debtor for not paying his debts,

Digitized by Google

and by so doing it deprived him of all means of payment. If the creditor happened to be either a sensible or a merciful man, he would not avail himself of the means of torture which the law placed in his hands; but, if he were otherwise, the condition of the debtor was scarcely less unfortunate than that of any convicted felon. In some respects it was less fortunate. For the latter, by accepting the definite punishment awarded to him, might, in other than capital cases, regain his liberty; while the imprisonment of the former, unless the aid of friends, or the accidental acquisition of fortune enabled him to make payment of the debt, might terminate only with his life.

The laws under which, through motives of humanity toward the debtor and his family, a considerable portion of his property is now exempt from execution are chiefly, if not exclusively, the result of statutes enacted in the various states of the American Union. These statutes differ greatly from one another in the enumeration of property exempted, though they are all animated by the same spirit, and intended to accomplish the same humane purposes. A few of them permit a debtor to select personal property of which he is the owner to the extent in value named in the statutes, and thus, in effect, allow him to decide, within the limitations designated, what portion of his assets he will retain as exempt from execution; many of them provide that his wages or earnings shall not be subject to garnishment, if necessary for his support, or that of his family residing within the state, and the vast majority designate specific articles which shall not be taken in execution without the consent of the debtor. These articles are naturally those which the legislature believes to be specially necessary,

Digitized by Google

for the comfort and support of the debtor and his family, such, for instance, as provisions, wearing apparel, household furniture, tools of trade, implements of husbandry, certain domestic animals and the seed essential to enable a husband to plant and sow the annual crop on which he is dependent for his livelihood. The practitioner must necessarily study the subject of exemptions mainly by the aid of the statutes of his own state. The most that can be accomplished in a text-book is to call attention to those principles which are of general application, and to give such interpretation, as can be found in the reports, of the various terms and phrases contained in the different statutes.

It is of primary importance that the practitioner should understand the spirit in which the statute of his state will be received and construed by its courts. While it is true that lands were not subject to execution at the common law, their exemption was dictated by other considerations than those of benevolence to the debtor and his family. That there should be property which in its nature was generally subject to execution, but which was exempt for certain persons or in certain cases, to mitigate the misfortunes of debtors, was unknown to the common law. Statutes of exemption, whether referring to real or personal property, may therefore properly be characterized as in derogation of the common law;[1] and if there were a universal rule that statutes in derogation of the common law must be strictly construed, then such a construction of statutes of exemption would be unavoidable. This construction has in fact been proclaimed in some in-

[1] Garaty v. Du Bose, 5 S. C. 500; Briant v. Lyons, 29 La. Ann. 65; Todd v. Gordy, 28 La. Ann. 666.

Digitized by Google.

stances.[2] Where this rule prevails, no property can be successfully claimed as exempt which does not clearly appear to be embraced within the specification contained in the statute. But in most of the states it does not prevail, nor can it be permitted to prevail anywhere without forgetting that the "quality of mercy is not strained." We can hardly conceive the propriety of strictly construing a statute of mercy or benevolence. Unless its validity can be wholly denied because of the want of legislative power to enact it, it should be given full effect by interpreting it in the spirit in which it was conceived and adopted, and with a view of accomplishing all its manifest objects. It is true that exemption laws are occasionally perverted from their laudable purposes. They sometimes enable debtors in comfortable circumstances to bid defiance to creditors more impoverished than themselves. They sometimes assist scoundrels to consummate the most cruel frauds. But in the vast majority of cases their operation is highly meritorious. They often assure to the family the shelter of a home, the means of obtaining a livelihood, and the earnings of its natural head and protector. They mitigate the harshness of the cruel and grasping creditor, and give to the most unfortunate of debtors a place of refuge and a gleam of hope. Because of their meritorious purposes and their remedial character, the courts have generally treated them with the utmost consideration, and have been inclined to extend rather than to restrict their operation.

[2] Guillory v. Deville, 21 La. Ann. 686; Crilly v. Sheriff, 25 La. Ann. 219; Boston B. Co. v. Iverson, 28 La. Ann. 695; White v. Heffner, 30 La. Ann. 1280; Buckingham v. Bellings, 13 Mass. 82; Grimes v. Bryne, 2 Minn. 106; Temple v. Scott, 3 Minn. 419; Rue v. Alter, 5 Denio, 119; Ward v. Huhn, 16 Minn. 159; Knabb v. Drake, 23 Pa. St. 489, 62 Am. Dec. 352.

Digitized by Google

Hence, the rule is well supported, and is constantly growing in favor, that exemption laws, being remedial, beneficial, and humane in their character, must be liberally construed.[3] Wherever this rule prevails, and it does not clearly appear whether certain property is or is not embraced within the exempting statute, the debtor will generally be allowed the benefit of the doubt, and suffered to retain the property.

Doubtless the courts will always distinguish between enacting and construing, and not undertake to supply omissions made by the legislature. This will

[3] Allman v. Gann, 29 Ala. 240; Favers v. Glass, 22 Ala. 621, 58 Am. Dec. 272; Sallee v. Waters, 17 Ala. 482; Noland v. Wickham, 9 Ala. 169; Wassell v. Tunnah, 25 Ark. 101; Montague v. Richardson, 24 Conn. 346, 63 Am. Dec. 173; Good v. Fogg, 61 Ill. 449; Deere v. Chapman, 25 Ill. 610; Bevan v. Hayden, 13 Iowa, 122; Kenyon v. Baker, 16 Mich. 373; King v. Moore, 10 Mich. 538; Wade v. Jones, 20 Mo. 75; Megehe v. Draper, 21 Mo. 510; Carpenter v. Herrington, 25 Wend. 370, 37 Am. Dec. 239; Stewart v. Brown, 37 N. Y. 350; Alvord v. Lent, 23 Mich. 369; Ford v. Johnson, 34 Barb. 364; Becker v. Becker, 47 Barb. 497; Tillotson v. Wolcott, 48 N. Y. 188; Buxton v. Dearborn, 46 N. H. 44; Richardson v. Duncan, 2 Heisk. 220; Webb v. Brandon, 4 Heisk. 285; Hawthorne v. Smith, 3 Nev. 182; Cobbs v. Coleman, 14 Tex. 594; Anderson v. McKay, 30 Tex. 190; Rodgers v. Ferguson, 32 Tex. 534; Gilman v. Williams, 7 Wis. 329; Connaughton v. Sands, 32 Wis. 387; Kuntz v. Kinney, 33 Wis. 510; Webster v. Orne, 45 Vt. 40; In re Jones, 2 Dill. 343; Shaw v. Davis, 55 Barb. 389; Vogler v. Montgomery, 54 Mo. 577; Carrington v. Herrin, 4 Bush, 624; Puett v. Beard, 86 Ind. 172, 44 Am. Rep. 280; Butner v. Bowser, 104 Ind. 255; Kennedy v. Smith, 99 Ala. 83; Wilson v. Lowry (Ariz.), 52 Pac. 777; In re McManus, 87 Cal. 292, 22 Am. St. Rep. 250; Martin v. Bond, 14 Colo. 466; Rutter v. Shumway, 16 Colo. 95; Elliott v. Hall, 2 Idaho, 1143, 35 Am. St. Rep. 285; Pickrell v. Jerauld, 1 Ind. App. 10, 50 Am. St. Rep. 192; Finlen v. Howard, 126 Ill. 259; Morgan v. Rountree, 88 Ia. 249, 45 Am. St. Rep. 234; Equitable L. A. Soc. v. Goode, 101 Ia. 160, 63 Am. St. Rep. 378; Millington v. Laurer, 89 Ia. 322, 48 Am. St. Rep. 385; Chapman v. Berry, 73 Miss. 437, 53 Am. St. Rep. 546; Ferguson v. Speith, 13 Mont. 487, 40 Am. St. Rep. 459; State v. Carson, 27 Neb. 501, 20 Am. St. Rep. 681; Yates Co. N. B. v. Carpenter, 119 N. Y. 550, 16 Am. St. Rep. 855; Noyes v. Belding, 5 S. D. 603; Linander v. Longstaff, 7 S. D. 157; Collier v. Murphy, 90 Tenn. 300, 25 Am. St. Rep. 698.

Digitized by Google

not bind them to a literal interpretation, nor prevent them from realizing objects clearly within the purpose of the act, though not literally within its terms. Thus, though a statute exempted a yoke of oxen, or a cow, or team of horses, the courts will not construe these terms so literally as to deny the exemption of a steer, heifer, or unbroken colt, of which the debtor has become possessed in his efforts to obtain a yoke of oxen, a cow, or a horse, as the case may be;[4] for the purpose to exempt

[4] Mallory v. Berry, 16 Kan. 293. Perhaps, in some instances, in the interests of impecunious humanity, the judges have gone beyond the bounds where interpretation ends and legislation begins. The cases tending in this direction, are cited and somewhat humorously commented upon in a note to Rockwell v. Hubbell's Adm'rs, 45 Am. Dec. 253, as follows: Thus, under the broad and liberal construction of these laws, terms supposed to be very definite in their meaning have become exceedingly elastic. In the sheltering aegis of statutory construction it has been found that a statute exempting a "team" will also exempt a two-horse wagon, probably because the team draws the wagon after it, or, in the language of the laws of conveyances, the wagon is attached to and runs with the team. Daines v. Prosser, 32 Barb. 290. Under the magical shadow of a statute construed in the cause of humanity, a heifer not two years old and wholly unknown to her masculine affinity, the bull, has been transformed into a cow. Freeman v. Carpenter, 10 Vt. 433, 33 Am. Dec. 210; Carruth v. Grassie, 11 Gray, 211. Two calves nine months old, having but lately undergone the process of weaning, have suddenly been promoted to the dignity, have been clothed with the toga virilis, as it were, of "a yoke of oxen or steers." The bucolic judge learnedly remarks: "They are calf-steers or steer-calves. . . . . These steers are not heifers, they were not bulls, and therefore must be steers" (Peck, J.); Mundell v. Hammond, 40 Vt. 641; and they were held exempt. Under the term "a yoke of oxen," a wild and untamed steer, twenty months old, whose neck ne'er knew the yoke, nor back the lash, has taken shelter and been protected from execution. Mallory v. Berry, 16 Kan. 293. And as if the statute were an Aladdin's lamp to effect a transformation, or judges jugglers to mix up words and meanings, a cart was held to include a four-wheeled wagon. Favers v. Glass, 22 Ala. 624. A yoke of oxen included a single ox. Wolfenbarger v. Standifer, 3 Sneed, 659. A mule is a horse in Texas. Allison v. Brookshire, 38 Tex. 199. But Tennessee goes Texas one better. There a jackass is a cosmopolitan

Digitized by Google

these under the circumstances is sufficiently manifest, though the literal words of exemption are not co-extensive with the signification given to them. The fact that a judge who is called upon to construe an exemption statute does not concede its wisdom or justice should not deter him from construing it liberally and with a view of accomplishing the purposes which the legislature apparently intended to promote by its enactment. "Whether the exemptions given go farther than they ought to is for the consideration of the legislature; the courts have no duty or power in such matters other than to enforce such laws as the legislature may enact; and in arriving at the legislative intention, as shown by the words used, the courts must give such words the signification the legislature has declared it intended them to have." [5]

Doubtless the reason of the legislature for exempting property from execution ordinarily is, that it is believed to be necessary to the judgment debtor; but the legislative judgment upon this subject is conclusive, and is not subject to review by the courts. Hence, it cannot, from property declared to be exempt, set aside to the debtor such as, in its opinion, is necessary for his use, and permit the residue to be taken in execution. The statutes of California exempt the farming utensils and implements of husbandry of a judgment debtor.

in his nature, and may be either "horse, mule, or a yoke of oxen." An explanation might be found for a jackass being a horse in the mathematical axiom, that things which are equal to the same thing are equal to each other, and each is a half brother to the mule; and so one might be found for a jackass being a mule under the statute which considers the half blood the same as the whole blood; but why a jackass is an ox or a yoke of oxen must forever remain shrouded in deep and inscrutable mystery. Richardson v. Duncan, 2 Heisk. 220.

[5] Alsup v. Jordan, 69 Tex. 300, 5 Am. St. Rep. 53.

Digitized by Google

An officer, after levying upon utensils and implements of the character designated in the statute, on demand of the debtor, returned to him such of them only as the officer thought necessary, and the court, in effect, sustained the officer in refusing to deliver to the debtor property which it found to be unnecessary to cultivate an ordinary farm, but the appellate court, in reversing the judgment, said: "Whether any property shall be exempt from execution, as well as the character and amount of property to be exempt, is purely a question of legislative policy, and when the legislature has determined that the farming utensils and implements of husbandry of a judgment debtor shall be exempt, the court is not authorized to refuse the exemption, because, in its opinion, they are not necessary for the judgment debtor."[6]

So the courts are not authorized to grant or withhold an exemption according as they may find that the claimant of it has acted in a praiseworthy or honorable manner, or the reverse. They are not to create exceptions not warranted by the language of the statute granting the exemption, but are to apply the statute in favor of each claimant, irrespective of his moral character, or his immoral or fraudulent conduct.[7] Nor should the court undertake to investigate the purposes of the debtor in claiming his exemption, or whether the property, if allowed to him as exempt, may be taken from him by a paramount title,[8] or may be turned over by him to some other creditor pursuant to an agreement already made by the debtor.[9] The court must

[6] Spence v. Smith, 121 Cal. 536, 66 Am. St. Rep. 62.

[7] Boylston v. Rankin, 114 Ala. 408, 62 Am. St. Rep. 111; Sannoner v. King, 49 Ark. 299, 4 Am. St. Rep. 49.

[8] Steen v. Hamblett, 66 Miss. 112.

[9] Kreisel v. Eddy, 37 Neb. 63.

Digitized by Google

content itself with determining whether the property claimed is exempt by the terms of the statute relied upon. In determining that the exemption laws must be liberally construed, the courts have not intended to sanction judicial legislation. If certain articles are by statute exempt to a debtor of a specified class, the courts will not affirm the exemption of other articles on the ground that they are equally necessary with those mentioned in the statute.[10]

§ 209. Extraterritorial Effect of Exemption Laws.— It is undoubtedly true that, for most purposes, exemption laws must be treated as part of the lex fori, and as having no operation beyond the state in which they were enacted, and when the question arises as to whether a parcel of property, real or personal, is exempt from execution, that question must be determined by the laws of the state wherein the property was situated when it was seized under execution.[11] The exemption laws existing in the state in which a contract was made do not constitute any part of it. Hence, if the debtor goes into another state, and a judgment is there obtained or a garnishment there issued against him, he cannot successfully insist that he shall be entitled to the same exemptions to which he was entitled in the state where the contract was made, nor, on the other hand, can the creditor subject to execution property exempt in the state where his writ issued on the ground that it was not exempt where contract was

[10] Stanton v. French, 91 Cal. 274, 25 Am. St. Rep. 174.

[11] East Tennessee etc. Co. v. Kennedy, 83 Ala. 462, 3 Am. St. Rep. 755; Wabash R. R. Co. v. Dougan, 142 Ill. 248, 34 Am. St. Rep. 74; Lyon v. Callopy, 87 Ia. 567, 43 Am. St. Rep. 396; Stewart v. Thompson, 97 Ky. 575, 53 Am. St. Rep. 431; Balk v. Harris, 122 N. C. 64; Carson v. Railway Co., 88 Tenn. 646, 17 Am. St. Rep. 921.

Digitized by Google

made. Hence a resident of one state, having property in another, cannot hold it as exempt by virtue of the exemption laws of the state of his domicile.[12] Statutes of exemption are regarded as relating to or affecting the remedy, as constituting part of the lex fori only. When an action is brought in a state, its exemption laws must be accepted as an unavoidable incident of the remedy conceded by its courts. The contract may have been made in another state, where the exemption laws are either more illiberal to the debtor, or deny him all exemption as against this particular cause of action. This immunity from exemption laws does not attend the contract; and, when sought to be enforced in another state, satisfaction of the judgment thereon obtained cannot be had in violation of the exemption laws of the latter state.[13]

Statutes of exemption being generally conceded to be a part of the lex fori, the question arises whether they do not necessarily extend to the protection of all persons who are sued or pursued within the state, unless their provisions are explicitly, or by necessary implication, restricted to residents or to some other desig-

[12] Boykin v. Edwards, 21 Ala. 261. The case of Pierce v. C. & N. W. R. R. Co., 36 Wis. 283, 2 Cent. L. J. 377, may somewhat conflict with the views expressed in this section. That case is, however, very severely criticised (see 2 Cent. L. J. 374, 378, 447), and so far as it gives countenance to the theory that a contract may be enforced according to the lex loci rather than the lex fori, the case is utterly indefensible. Newell v. Hayden, 8 Iowa, 140; Woodbridge v. Wright, 3 Conn. 523; Atwater v. Townsend, 4 Conn. 47; Toomer v. Dickerson, 37 Ga. 428; Coffin v. Coffin, 16 Pick. 323; Wood v. Malin, 5 Halst. 208; Whittemore v. Adams, 2 Cow. 626; White v. Canfield, 7 Johns. 117, 5 Am. Dec. 249; Smith v. Atwood, 3 McLean, 545; Hinkley v. Marean, 3 Mason, 88; Haskill v. Andros, 4 Vt. 609, 24 Am. Dec. 645.

[13] Helfenstein v. Cave, 3 Iowa, 287; American C. I. Co. v. Heuter, 46 Ill. App. 416.

Digitized by Google

nated class of persons. With natural partiality toward their fellow-citizens, the courts of some of the states have construed their exemption laws as operative only in behalf of residents. Thus, where the defendant had absconded from the state, the court said: "In case a debtor abscond from the state with the purpose of avoiding the service of process and all responsibility to its laws, and of placing himself permanently beyond their reach and influence, he must be regarded as voluntarily abandoning all claim to participate in any of the personal benefits and privileges conferred by such laws upon those remaining subject to their jurisdiction. In the language of Woodward, J., in Yelverton v. Burton, 26 Pa. St. 351, 'if he will not come within our jurisdiction to answer to his liabilities, let him not come to appropriate our bounties.' It cannot, therefore, be presumed that the legislature intended to extend the benefits of the exemption laws to this class of persons."[14] "States are not accustomed to give exemptions from the laws for the collection of debts for the benefit of persons resident in other jurisdictions. The exemptions are personal privileges, dependent on personal or family circumstances; and if one who possesses them removes to a foreign state, whereby he would acquire under its laws privileges more or less liberal, not possessed by our own people, he thereby abandons those he possessed before, so far as they were local in their nature. And if exemption privileges are not necessarily local, they are certainly in their reasons." They are conferred on grounds of state policy, to add to the comfort and encourage the industry of the people; and every state will make such regulations on the subject as its own people will deem wisest and

[14] Orr v. Box, 22 Minn. 485.

Digitized by Google

best.[15] In other states the application of exemption laws to nonresidents, whether temporarily within the state or absent therefrom, is denied by statute.[16] In one of these states it has been held that where the defendant resided within the state, and was entitled to exemption at the time he claimed it, such demand consummated his right, and his subsequent removal from the state was immaterial.[17] In at least one state persons who have left its jurisdiction for the purpose of defrauding their creditors have, by statute, been denied the benefit of the exemption laws, and all their property is subject to execution, though the claim of exemption is interposed by dependent members of their family who remain within the state.[18]

That the object of the legislature in enacting exemption laws was solely to benefit or protect the citizens of the state will, if regarded as a question of fact, admit of no serious controversy, for the view of the average legislator is rarely sufficiently comprehensive to embrace the citizens of a sister state or of foreign nations. It is equally beyond controversy that this limited object is not apparent in many of the statutes, and exists only as the result of judicial interpolation. This interpolation will not be made in several of the states, and the reasons for not making it have been thus forcibly stated: "Whatever remedy our laws give to enforce the performance of a contract will equally avail

[15] McHugh v. Curtis, 48 Mich. 262; Lisenbee v. Holt, 1 Sneed, 42; Hawkins v. Pearce, 11 Humph. 44; Finlay v. Sly, 44 Ind. 266; Yelverton v. Burton, 26 Pa. St. 351; Prater v. Prater, 87 Tenn. 78, 10 Am. St. Rep. 623; Kile v. Montgomery, 73 Ga. 337.

[16] Graw v. Manning, 54 Iowa, 719; Allen v. Manasse, 4 Ala. 554; Porter v. Navin, 52 Ark. 352; Post v. Bird, 28 Fla. 1; Stotesbury v. Kirtland, 35 Mo. App. 148; Jones v. Alsbrook, 115 N. C. 46.

[17] McCrary v. Chase, 71 Ala. 540.

[18] Carter v. Davis, 6 Wash. 327.

Digitized by Google

the citizen or the foreigner; and they equally must be subject to any restraints which the law imposes upon them. Our inhabitants can have no greater rights in enforcing a claim against a foreigner than an alien can have in enforcing a similar claim against one of our own citizens. Whoever submits himself or his property to our jurisdiction must yield to all the requirements which are made of our citizens in relation to the collecting of debts, or maintaining suits; and is clearly entitled to all the benefits, exemptions, and privileges to which other debtors or suitors belonging to our own state are subject or entitled. If the one can hold a cow, suitable wearing apparel, and necessary household furniture, without having the same taken from him by execution, so can the other. Nothing short of the express language of a statute would justify us in saying that a person may, by virtue of an execution, be stripped of his wearing apparel, his necessary household furniture, and his only cow, merely because he resides under another government, when a person residing here would not be subject to the same inconvenience and distress." [19] "The statute makes no discrimination between temporary and permanent residents, nor does it purport to confine its privileges to residents at all. It exempts certain articles of the debtor and his family. And we think it would be entirely inconsistent with the beneficent intentions of the statute as well as with the dignity of a sovereign state, to say that the temporary sojourner, or even the stranger within our gates, was not entitled to its protection." [20]

[19] Haskill v. Andross, 4 Vt. 609, 24 Am. Dec. 645.

[20] Lowe v. Stringham, 14 Wis. 225; Hill v. Loomis, 6 N. H. 263; Mineral Point R. R. Co. v. Barron, 83 Ill. 365; Wright v. C. B. &

Digitized by Google

The chief difficulty in denying extraterritorial effect to exemption laws is in applying them to proceedings attempting to garnish indebtedness not subject to garnishment in the state where it was contracted and where the debtor and creditor still reside. If a person to whom a debt is owing has ceased to be a resident of the state wherein it was contracted, and has become a resident of the state wherein it was garnished, there is no doubt that he cannot invoke the protection of the laws of his domicile, and that the question of exemption must be solved by the laws of his present domicile, from whose courts the writ issued.[21] He may, and usually does, remain a resident of the state where the debt was contracted, and the attempted garnishment in another state is ordinarily for the purpose of evading the exemption laws of the debtor's domicile. The first question presented is one not directly connected with the subject here under consideration. It is, what is the situs of a debt for the purpose of garnishment? Respecting property of a tangible nature, capable of manual possession and delivery, it clearly has no situs, except where it is in fact, and cannot be levied upon or garnished in a state or country where it is not.[22] Mere choses in action are, for most purposes, regarded as having their situs at the domicile of the creditor, and, if this rule were applicable to garnishment, the proceeding therefor would have to be conducted within the

Q. R. R., 19 Neb. 175; Menzie v. Kelly, 8 Ill. App. 259; Mo. P. Ry. v. Maltby, 34 Kan. 125; Kansas C., St. J. & C. B. Ry. v. Gough, 35 Kan. 1; Sproul v. McCoy, 26 Ohio St. 577; Wabash R. R. v. Dougan, 142 Ill. 248, 34 Am. St. Rep. 74; Everett v. Herrin, 46 Me. 357, 74 Am. Dec. 455; Bond v. Turner (Or.), 54 Pac. 158; Bell v. Indiana L. S. Co. (Tex.) 11 S. W. 344.

[21] Morgan v. Neville, 74 Pa. St. 52.

[22] Bowen v. Pope, 125 Ill. 28, 8 Am. St. Rep. 330.

Digitized by Google

jurisdiction of that domicile and in accordance with its laws. Obviously, however, garnishment cannot be effective except at the domicile of the debtor, or, at least, in some place where he can be found and personal service of process made upon him. The remedy against him must be sought under the laws of the state wherein process may be so served upon him as to support a personal judgment against him. Hence, for the purpose of garnishment, we think the weight of authority affirms either that a debt has no situs, or that its situs is with the person of the debtor, and that it may be garnished wherever he is, and that a judgment there entered against the garnishee is binding upon him, irrespective of the place of residence of the creditor, and, when followed by payment, extinguishes the claim of the creditor, so that the latter cannot maintain any action to recover the debt so paid, though such action be brought at the domicile of the creditor, where the debt was by law exempt from execution.[23] From these decisions the courts of several states dissent. Thus, the courts of Michigan and Mississippi both affirm that the situs of a debt is at the domicile of the creditor, and it hence cannot be garnished elsewhere, and that, if it is attempted to be garnished in a state of which the creditor is not a resident and where he has not been personally served with process, the courts will dismiss the proceeding, if shown that the

[23] East Tenn. R. Co. v. Kennedy, 83 Ala. 462, 3 Am. St. Rep. 755; Harwell v. Sharp, 85 Ga. 124, 21 Am. St. Rep. 149; Wabash R. R. Co. v. Dougan, 142 Ill. 248, 34 Am. St. Rep. 74; Lancashire I. Co. v. Corbetts, 165 Ill. 592, 56 Am. St. Rep. 275; Lyon v. Callopy, 87 Ia. 567, 43 Am. St. Rep. 396; Stewart v. Thomas, 97 Ky. 575, 53 Am. St. Rep. 431; Chicago etc. Co. v. Moore, 31 Neb. 629, 28 Am. St. Rep. 534, Balk v. Harris, 122 N. C. 64; Carson v. Railway Co., 88 Tenn. 646, 17 Am. St. Rep. 921; Berry v. Davis, 77 Tex. 191, 19 Am. St. Rep. 748.

Digitized by Google

debt is exempt in the state of the creditor's residence,[24] and in Mississippi it is insisted that, though a judgment be entered against the debtor in a state where the creditor does not reside, it will not protect the debtor from an action in the state of his domicile, where the debt is exempt from execution.[25] The courts of Nebraska also declare that a debt is subject to garnishment only in the state wherein the creditor resides and where it is payable, and that a corporation cannot be garnished in one state for a debt created and payable in another, where the creditor still resides,[26] though if the court wherein the garnishment is made holds that it has jurisdiction and enters and enforces a judgment against the garnishee, such judgment, if paid, will protect him in the state of the creditor's domicile.[27] So in New York it is settled that a domestic corporation cannot be garnished in another state for a debt due a home creditor, though it is also engaged in business where garnished and is required to have, and has, an agent therein upon whom process against it may be served.[28] In Delaware the position is taken that garnishment cannot be effective in a state unless the court may obtain the legal control of the res, and that the res or debt has its situs with the rightful owner and "follows the person of the creditor for the purposes of garnishment as well as for many other purposes," except where the garnishee is a resident of the state

[24] Drake v. Lake Shore etc. Co., 69 Mich. 168, 13 Am. St. Rep. 382.

[25] Illinois etc. R. Co. v. Smith, 70 Miss. 344, 35 Am. St. Rep. 651.

[26] American C. I. Co. v. Hettler, 37 Neb. 849, 40 Am. St. Rep. 522, Singer M. Co. v. Fleming, 39 Neb. 679, 42 Am. St. Rep. 613.

[27] Chicago etc. R. R. Co. v. Moore, 31 Neb. 629, 28 Am. St. Rep. 534.

[28] Douglass v. Phoenix Ins. Co., 138 N. Y. 209, 34 Am. St. Rep. 448.

Digitized by Google

where the proceedings are instituted and is under the exclusive jurisdiction of that state; that where the defendant and the garnishee are both nonresidents, jurisdiction cannot be taken by the courts of the state making the garnishment on the ground that the garnishee is a corporation doing business within the state, if the debt due from it arose from a contract made in another state with a citizen thereof.[29] In Wisconsin a judgment in favor of a resident cannot be garnished in another state where neither he nor his debtor reside.[30]

Conceding that the exemption laws of one state cannot be so far recognized in another as to there be so successfully pleaded or urged as to obtain exemption from execution of a debt there sought to be garnished, they may yet be made effective in other ways. Thus, persons or corporations seeking to avoid the exemption laws of the domicile of a person to whom a debt is owing, and resorting to the courts of another state where similar laws do not exist, may, in some of the states, be prevented from doing so by injunction, or may be compelled to surrender any advantage they may have secured. The remedy by injunction is available only when the party seeking the aid of the courts of another state to avoid the exemption laws of the debtor's domicile is a resident of the same state with his debtor. Here, as the courts of the state of the common domicile have jurisdiction of both parties, they may grant one any appropriate relief against the other, and may therefore restrain one from pursuing the other in the courts of another state to accomplish the inequitable purpose of evading the exemption laws of their

[29] National Bank of W. & B. v. Furtick, 2 Mar. 35, 69 Am. St. Rep. 99.

[30] Renier v. Hurlbut, 81 Wis. 24, 29 Am. St. Rep. 850.

Digitized by Google

domicile.[31] This rule has been extended in Iowa to protect from execution in Nebraska a team which had been taken to the latter state by a resident of Iowa, for a temporary purpose. "Residents of one state, in the prosecution of their ordinary business often find it necessary to take exempted property, for temporary use, in earning support for their families, into adjoining states. It would be unjust, oppressive, and absurd to permit creditors to follow such persons and seize their property, exempt from their debts, the moment they had passed the boundary line of the state."[32]

Whether a creditor proceeding by garnishment in another state to collect a debt due to his debtor and exempt by the laws of their common domicile is liable to an action for so doing in the absence of any statute expressly creating the liability is subject to some doubt. On the one hand it is insisted that a resident of any one of the United States has a right to resort to the courts of any of the others, and to there pursue such remedies as may be afforded to him, and that the pursuit of this right, being in violation of no law, cannot be subject to a penalty nor give rise to any cause of action, and hence that the debtor so pursued into another state cannot maintain any action to recover the damages suffered by him from being thereby deprived of the benefit of the exemption laws of his domicile.[33] This reasoning will not bear scrutiny. It is true that every citizen of the United States is entitled to resort to

[31] Allen v. Buchanan, 97 Ala. 399, 38 Am. St. Rep. 187; Teager v. Landsley, 69 Ia. 725; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Snook v. Snetzer, 25 Oh. St. 516; Griggs v. Doctor, 89 Wis. 161, 46 Am. St. Rep. 824.

[32] Mumper v. Wilson, 72 Iowa, 163, 2 Am. St. Rep. 238.

[33] Harwell v. Sharp, 85 Ga. 124, 21 Am. St. Rep. 146.

Digitized by Google

the courts of any of the states, whether resident thereof or not, but it is not true that he is entitled to resort to any of them for a sinister purpose. Even where tangible property was taken by a debtor into another state for a temporary purpose and the creditor knew this, and, for the purpose of avoiding the debtor's right of exemption, brought an action and seized and sold the property in the state wherein it was taken, the debtor was permitted, in the state of the common domicile, to recover the value of the property thus lost to him. In determining this question, the court said: "The important question involved in this appeal is, whether or not a citizen of this state, who is an insolvent debtor, may go into another state for the purposes incident to interstate commerce, social intercourse, or special business, without subjecting his property, exempt by the laws of this state from execution and attachment, which he happens to take with him, to the payment of debts due another citizen of this state, who may be watchful enough to follow and attach such property, and the debtor have no redress. It seems to us that the law will not allow a creditor to so evade and annul the laws of his own state."[34] In Nebraska an action was sustained by a debtor against his creditor on the ground that the latter had assigned the debt to a resident of another state to enable the latter to sue therein and to subject the debt to garnishment, though it was exempt therefrom by the laws of the state of the debtor's domicile.[35] The Code of Civil Procedure of this state now provides that it shall be unlawful for a creditor to assign a debt to any person or corporation, or to institute any suit or proceeding in another state

[34] Stewart v. Thomson, 97 Ky. 575, 53 Am. St. Rep. 431.
[35] O'Connor v. Walter, 37 Neb. 267, 40 Am. St. Rep. 486.

Digitized by Google

for the purpose of avoiding the debtor's right of exemption in the state of his domicile, and that any person violating the act shall be liable to the party injured for the amount of the debt and all costs, including reasonable attorney's fee, and to punishment by a fine not exceeding two hundred dollars and the costs of prosecution. This statute, though assailed as unconstitutional, was sustained by the supreme court of the state.[36]

§ 210. **Exemption from Executions from Federal Courts.**—A party recovering judgment in any common-law cause in any circuit or district court of the United States, according to the present statutory provisions governing this matter, "shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like cause by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments as aforesaid, by execution or otherwise."[37] It follows from this provision, that property exempt from process issued out of a state court may not be exempt from process issued out of a court of the United States. The state exemption laws cannot be enforced against creditors having judgments in the federal courts, except where those laws have been adopted by virtue of the statute quoted above, or of general rules prescribed by the federal courts in the

[36] Singer M. Co. v. Fleming, 39 Neb. 679, 42 Am. St. Rep. 613.
[37] Desty's Federal Procedure, sec. 916; 17 U. S. Stats. 197.

Digitized by Google

exercise of authority conferred by that statute.[38] To determine what property may be successfully claimed as exempt as against a writ issued from a district or circuit court of the United States, we must first examine the exemption laws in force in the state wherein such court was held at the date of the passage of the statute just referred to, and must next ascertain what subsequent state statutes have been adopted by the court issuing the writ.[39] Section 914 of the Revised Statutes of the United States provides that "the practice, pleading, and forms of proceeding in civil cases, other than admiralty and equity cases, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of procedure existing at the time in like cases in the courts of record of the state within which circuit and district courts are held, any rule of court to the contrary notwithstanding." Standing alone, this section would appear to control the subject of executions and exemptions thereunder, and to make executions in the national courts in common-law cases subject in all respects to the rules applicable to like writs in the state courts. It is settled, however, that section 916 of these statutes is the one controlling writs of execution, and hence that only those state statutes prevail in the national courts which were in existence when that section was enacted or which, though subsequently en-

[38] Rogers v. McKenzie, 1 Heisk. 514; United States Bank v. Halstead, 10 Wheat. 51; Lawrence v. Wickware, 4 McLean, 56.

[39] With respect to the final process of the federal courts and its freedom from state control, see Wayman v. Southard, 10 Wheat. 1; Boyle v. Zacharie, 6 Pet. 648; Beers v. Haughton, 9 Pet. 331; Ross v. Duval, 13 Pet. 45; United States v. Knight, 14 Pet. 301; Amis v. Smith, 16 Pet. 303; Massingall v. Downs, 7 How. 760.

Digitized by Google

acted, have been adopted by general rules of the circuit and district courts.[40]

As against proceedings under the late bankrupt act of the United States, the following exemptions prevailed: "The necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value in any case the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children; and the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States; and such other property as now is or hereafter shall be exempted from attachment, or seizure, or levy in execution by the laws of the United States, and such other property not included in the foregoing exemptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1871." [41]

This portion of the statute, so far as it adopted the state exemption laws, was objected to as unconstitutional, because it is not uniform in its operation. This objection was never sustained.[42] But by an amendment, enacted in 1873, it was provided that the exemp-

[40] Lamaster v. Keeler, 123 U. S. 376.

[41] See section 14 of act of 1867; § 5045, R. S. U. S.

[42] In re Beckerford, 1 Dill. 45; 2 Nat. Bank. Reg. 203; In re Wylie, 5 L. T. B. 330; In re Deckert, 10 Nat. Bank. Reg. 1; Am. L. T., N. S., 336; 9 Alb. L. J. 330; 6 Chic. L. N. 310.

Digitized by Google

tions "shall be the amount allowed by the constitution and law of each state respectively, as existing in the year 1871; and that such exemptions be valid against debts contracted before the adoption and passage of such state constitutions and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."[43] This amendment was an attempted adoption of state laws which had been, or were likely to be, declared invalid by the state tribunals, because they impaired the obligation of contracts. It was frequently attacked on the ground that it did not, like the former law, adopt the state statutes; but, in effect, prescribed a direct law upon the subject; that the law so prescribed could not be uniform in its operation, and was therefore not authorized by the constitution when it granted congress the power to enact bankrupt laws which should be uniform in their operation. The constitutionality of the amendment was frequently sustained;[44] though sometimes denied.[45] The title to the property exempted by the bankrupt act did not vest in the assignee, but remained in the bankrupt.[46] The bankrupt was entitled to the state exemption, in addi-

[43] 17 U. S. Stat. 577.

[44] In re Jordan, 8 Nat. Bank. Reg. 180; In re Kean and White, 8 Nat. Bank. Reg. 367; In re W. A. Jordan, 10 Nat. Bank. Reg. 427; In re Owens, 12 Nat. Bank. Reg. 518; In re J. W. Smith, 8 Nat. Bank. Reg. 401; 6 Chic. L. N. 33.

[45] In re Deckert, 10 Nat. Bank. Reg. 1; Am. L. T., N. S., 236; 9 Alb. L. J. 330; Chic. L. N. 310; In re Kerr and Roach, 9 Nat. Bank. Reg. 566; In re Duerson, 13 Nat. Bank. Reg. 183; In re Dillard, 9 Nat. Bank. Reg. 8; 6 L. T. B. 490.

[46] In re Lambert, 2 Nat. Bank. Reg. 426; In re Hester, 5 Nat. Bank. Reg. 285; Rix v. Capitol Bank, 2 Dill. 367.

Digitized by Google

tion to the amount specified in the act.[47] The amount of property to be retained by the bankrupt by virtue of the state exemption laws could not exceed that allowed in the year 1871;[48] under the laws of the state or territory[49] in which he had his domicile at the time the proceedings in bankruptcy were instituted.[50] The property set aside to the bankrupt as exempt remained subject to all valid liens, other than those attachment liens which are dissolved by virtue of the proceedings in bankruptcy.[51] To be entitled to an exemption as a householder or head of a family, it was not indispensable that the bankrupt should have either a wife or children. It was sufficient that he kept house, and had persons living with him, and dependent upon him for support.[52] Nor could the bankrupt's right of exemption be diminished on account of his having a wife who owned a house or other separate property.[53] Exemption was frequently allowed to the bankrupt from the property of a partnership of which he was a member;[54]

[47] In re Ruth, 1 Nat. Bank. Reg. 154; 7 Am. Law Reg. 157; In re Cobb, 1 Nat. Bank. Reg. 414; 1 L. T. B. 59; In re Hezekiah, 11 Nat. Bank. Reg. 573; 2 Dill. 551.

[48] In re Askew, 3 Nat. Bank. Reg. 575.

[49] In re McKercher and Pettigrew, 8 Nat. Bank. Reg. 409.

[50] In re Stevens, 5 Nat. Bank. Reg. 298; 2 Biss. 373.

[51] In re Perdue, 1 Nat. Bank. Reg. 183; 2 West. Jur. 279; In re Whitehead, 2 Nat. Bank. Reg. 599; In re Brown, 3 Nat. Bank. Reg. 250; 2 L. T. B. 122; 1 Chic. L. N. 409; Fehley v. Barr, 66 Pa. St. 196; In re Hutto, 3 Nat. Bank. Reg. 781; 1 L. T. B. 226; 3 L. T. B. 179; In re Coons, 5 Chic. L. N. 515; Haworth v. Travis, 13 Nat. Bank. Reg. 145.

[52] In re Taylor, 3 Nat. Bank. Reg. 158; In re Ruth, 1 Nat. Bank. Reg. 154; In re Cobb, 1 Nat. Bank. Reg. 414; 1 L. T. B. 59.

[53] In re Cobb, 1 Nat. Bank. Reg. 414; 1 L. T. B. 59; In re Tonne, 13 Nat. Bank. Reg. 171.

[54] In re Rupp, 4 Nat. Bank. Reg. 95; 2 L. T. B. 123; In re Young, 8 Nat. Bank. Reg. 440; McKercher and Pettigrew, 8 Nat. Bank. Reg. 409; In re Richardson & Co., 11 Nat. Bank. Reg. 114; 7 Chic. L. N. 62; In re Ralph, 4 Nat. Bank. Reg. 95; 2 L. T. B. 123; Stewart v Brown, 37 N. Y. 350.

Digitized by Google

but probably this cannot be permitted, as against the rights of the creditors of the firm, unless expressly sanctioned by the state laws.[55] Most of the exemptions allowed by the bankrupt act, independent of the state exemptions, were so specifically stated in the act as to be free from doubt, and from the need of judicial interpretation. The only questions liable to controversy were: 1. What might be held as "necessary household and kitchen furniture"; and 2. What were the "other articles and necessaries of the bankrupt" which the assignee might "designate and set apart." As the amount to be set apart was not to exceed five hundred dollars in value, there was little danger that the assignee could, without exceeding this limitation, set aside an unnecessary amount of household and kitchen furniture for the use of an ordinary family. The terms "other articles and necessaries" did not embrace articles of mere luxury, ornament, fancy, taste, or convenience; but only those things which are of immediate use, and needful to the debtor or his family in almost the same degree as is wearing apparel or household furniture.[56]

[55] In re Price, 6 Nat. Bank. Reg. 400; In re Handlin & Verny, 12 Nat. Bank. Reg. 49; 2 Cent. L. J. 264; Burns v. Harris, 67 N. C. 140; In re Blodgett & Sanford, 10 Nat. Bank. Reg. 145; In re Steuart and Newton, 13 Nat. Bank. Reg. 295; In re Hafer, 1 Nat. Bank. Reg. 547; Anonymous, 1 Bank. Reg. (quarto) 187; Pond v. Kimball, 101 Mass. 105; Guptil v. McFee, 9 Kan. 80.

[56] See In re Cobb, 1 Nat. Bank. Reg. 414; 1 L. T. B. 59; In re Graham, 2 Biss. 449; In re Ludlow, 1 N. Y. Leg. Obs. 322; In re Thiell, 4 Biss. 241; In re Comstock, 1 N. Y. Leg. Obs. 326; In re Williams, 4 Law. Rep. 155; In re Thornton, 2 Nat. Bank. Reg. 189; 8 Am. Law Reg. 42. Money may be allowed to the bankrupt as a necessary. In re Thornton, 2 Nat. Bank. Reg. 189; 8 Am. Law. Reg. 42; In re Lawson, 2 Nat. Bank. Reg. 54; In re Hay, 7 Nat. Bank. Reg. 344; In re Grant, 2 Story, 312; In re Daniel Welch, 5 Nat. Bank. Reg. 348; 5 Ben. 230.

Digitized by Google

The bankruptcy act of 1898 entitles a bankrupt to the exemptions allowed to him by the state laws, and none other. It declares that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by state laws in force at the time of the filing of the petition in the state wherein they have their domicile for six months, or the greater portion thereof, immediately preceding the filing of the petition."[57] To the bankrupt's exempt property his trustee acquires no title.[58] It is the duty of the bankrupt, within ten days after the adjudication of bankruptcy, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, to file a schedule of his property showing "the claim for such exemption as he may be entitled to."[59] Though the trustee does not acquire title to the exempt property, there is, nevertheless, imposed on him the duty to "set apart the bankrupt's exemptions, and to report the items and estimated value thereof to the court as soon as practicable" after his appointment.[60] Section 70 declares that "all real and personal property belonging to the bankrupt estate shall be appraised by three disinterested appraisers," who shall be appointed by, and report to, the court. It is probably the duty of the trustee under these circumstances to have appraised the property claimed to be exempt. Otherwise, we do not know how he can report to the court its value. As the exempt property does not vest in the trustee, it would be reasonable to infer that it does not fall within the jurisdiction of the bankruptcy court, were it not for

[57] National Bankruptcy Act, 1898, § 6.
[58] Ib. § 70.
[59] Ib. § 7.
[60] Ib. § 47.

Digitized by Google

subdivision 11 of section 2, which invests that court with power to "determine all claims of bankrupts to their exemptions." We infer therefrom that it is the duty of the bankrupt to claim all property which he seeks to hold as exempt, and of the assignee to act upon the claim, and that, if he refuses to concede the claim in whole or in part, the remedy of the bankrupt is to present the question to the court of bankruptcy. If this course is pursued, an examination of the records in that court must show the property exempt, and to which no title vests in the trustee. We apprehend, however, that an error or neglect on the part of the bankrupt resulting in his failure to claim, in his schedule or otherwise, his exemptions, or some part thereof, cannot be conclusive against him, nor result in the loss to him of the property exempt from execution.[61] Among the general orders in bankruptcy adopted by the supreme court of the United States, November 28, 1898, is one numbered XVII, providing that the trustee shall make report to the court within twenty days after receiving notice of his appointment of the articles set over to the bankrupt by him, with the estimated value of each article, and any creditor may take exception to the determination of the trustee within twenty days after the filing of the report, and the referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. Very singularly, the court apparently did not contemplate the possibility that the action of the trustee might not satisfy the bankrupt, and that the latter might wish to assail it in some manner. Hence, the question of how

[61] In re Hester, 5 B. R. 285; In re Lambert, 2 B. R. 426; In re Everett, 9 B. R. 90.

Digitized by Google

and when he may revise the trustee's action remains undetermined. If it were not for the apparently clear language of subdivision 11 of section 2 to the contrary, we might conclude, from the failure of the supreme court to include the matter within its rules, that it had determined that the claim of a bankrupt that he was entitled to property as exempt was not a proper question for the determination of a court sitting in bankruptcy.

§ 211. Whether the Officer must take Notice of Defendant's Rights before They are Claimed.—Perhaps the very first question in reference to the exemption law which an officer will desire to have answered is, whether it is his business to inquire whether particular property is exempt; or may he proceed to levy on any property within his reach, and hold it until claimed by the defendant? Different responses are made to this question in different states. In many of them, all property is considered as prima facie subject to levy, and the officer may safely proceed until the defendant claims the benefit of the exemption laws. Under this view of the law, the exemption is a mere personal privilege, to which the defendant must make some claim before it will be conceded, and before he can recover damages because it has not been recognized.[62] And if the defendant chooses not to assert his privilege, the officer has no sufficient excuse for not levying on the prop-

[62] Howland v. Fuller, 8 Minn. 50; Tullis v. Orthwein, 5 Minn. 377; Borland v. O'Neal, 22 Cal. 504; Twinam v. Swart, 4 Lans. 263; Dains v. Prosser, 32 Barb. 291; Baker v. Brintnall, 52 Barb. 188; State v. Melogue, 9 Ind. 196; Barton v. Brown, 68 Cal. 11; Osborne v. Schutt, 67 Mo. 712; Gilleland v. Rhoads, 34 Pa. St. 187; Pirie v. Harkness, 3 S. Dak. 178. But even in New York it is said that an officer cannot justify taking all the property of which he knew part to be exempt. Frost v. Mott, 34 N. Y. 253.

Digitized by Google

erty.[63] "Construing together all the statutory provisions bearing upon the seizure and sale of property upon execution, the inference is obvious that all the property of execution defendants in this state is considered as prima facie subject to execution, and that it is the duty of the officer holding an execution to proceed until some claim for exemption is lawfully interposed."[64] Whether the rule thus broadly stated will, in any of the states, be applied in all circumstances admits of doubt. It is unquestionably true, in some of the states, that a debtor who does not, within some reasonable time, claim his exemption, irrevocably waives it, and that, therefore, neither he nor his vendee can recover the property from a purchaser thereof under execution.[65] But the debtor may claim the exemption within a reasonable time, and then the question will arise whether the sheriff has been justified in proceeding until the claim is interposed. If the debtor knew of the levy, and made no objections to it, his temporary acquiescence might estop him from treating the officer as a wrongdoer. But suppose the debtor is ignorant of the levy, and therefore makes no claim. Meanwhile the officer enters the debtor's house, takes up his carpets and removes his furniture, or perhaps seizes and drives away the family cow. We doubt whether this would be justified in any state. The better rule perhaps is, that the officer should make a formal seizure, such as will give the judgment creditor the benefit of the property, if the debtor should elect not to claim his exemption, and should, on the other hand, do as little damage to the debtor as possible until he has

[63] Gresham v. Walker, 10 Ala. 370.

[64] Terrell v. State, 66 Ind. 575; Boesker v. Pickett, 81 Ind. 554; State v. Boulden, 57 Md. 314; Oliver v. White, 18 S. C. 235.

[65] Barton v. Brown, 68 Cal. 11.

Digitized by Google

knowledge of the levy and an opportunity to assert his rights.

It is not universally true that the defendant must claim his exemption. In Iowa, an action of replevin was maintained against the sheriff, although it was not contended that any claim for exemption had ever been interposed otherwise than by the suit.[66] In Minnesota, if the property is such that the officer can know that it is exempt, he has no right to levy upon it all. "Where a separate and distinct article of property is taken, which is expressly exempt by statute, and the party holding or directing the service of the writ knows before or at the time of such service that the property seized is exempt, there is no reason for claiming that the liability of the attaching party does not occur at the time of the levy, nor that a demand and refusal is necessary in order to make the party levying liable as a wrongdoer. In such circumstances, the wrong is committed at the instant of seizing the property, and the cause of action then accrues. A demand could not be necessary to inform the creditor of the rights of the debtor, for the statute fixes those, and a demand could be only an idle ceremony. The statute makes the exemption absolute, and not dependent upon selection or demand by the debtor."[67] In this state, though the statute provides that the debtor shall have so much of a specified class of property as may be necessary, and the question of what may not

[66] Parsons v. Thomas, 62 Iowa, 319. The date of the taking of the property does not appear in the report. It may be that the decision was controlled by section 4017 of the code as amended in 1882, by the terms of which the defendant does not waive his exemption, unless he fails to claim it after being notified so to do. Ellsworth v. Savre, 67 Iowa, 450.

[67] Lynd v. Picket, 7 Minn. 184, 82 Am. Dec. 79.

Digitized by Google

be necessary is a question of fact, still it seems not to be essential that the debtor make any demand upon the officer for his exemptions, and that the latter proceeds at his peril.[68] We think the better opinion is, that if property of any class found in the possession of the debtor is necessarily exempt, the officer must assume that the right of exemption will be claimed, and

[68] Howard v. Rugland, 35 Minn. 388. In this case, the court said: "§ 310, chapter 66, Gen. St. 1878, provides for the exemption from attachment or sale, on final process, of, among other things, certain livestock, 'and the necessary food,' for the same, 'for one year's support, either provided or growing, or both, as the debtor may choose'; and also of 'the provisions for the debtor and his family necessary for one year's support, either provided or growing, or both'; such food and 'provisions' to 'be chosen by the debtor, his agent, clerk, or legal representative, as the case may be'; also 'necessary seed grain' (not exceeding certain quantities) 'for the actual personal use of the debtor, for one season, to be selected by him.' A limited value is placed upon some of the articles exempt, but no limit of value is placed upon any of those above mentioned. With reference to their own language, and the decisions of this court in Lynd v. Picket, 7 Minn. 128, 82 Am. Dec. 79; Murphy v. Sherman, 25 Minn. 196; McAbe v. Thompson, 27 Minn. 134, the proper exposition of these provisions of statute is as follows: Where all the property which a debtor has, of the kind which is exempted, with a limit as to quantity or amount, and not with a limit as to value, does not exceed the quantity or amount which the statute exempts, there is no occasion for the debtor to choose or select the same as exempt. In such case the statute operates to choose and select it for him. See Zieke v. Morgan, 50 Wis. 560. To such property § 314, chap. 66, supra, which provides for an appraisal of value in a certain case, has no application; and when an officer assumes to levy an execution upon and sell property which the law thus chooses and selects as exempt, the levy and sale are per se illegal, and the officer liable to the debtor without any demand, as is also the execution creditor who participates in the levy and sale. Where the levy is upon food for stock, provisions, and seed grain, the question of what and how much is "necessary" is a question of fact for a jury; and if their verdict finds that all the stock, food, provisions, and seed grain which the debtor had at the time of the levy were necessary for the purposes for which the statute allows their exemption, the result is that all are exempt, and hence that the levy upon and sale of the whole, or any part thereof, are illegal."

Digitized by Google

is not justified in proceeding to levy on and sell such property, and where there is no necessity of the debtor to make any selection, because all is exempt, no affirmative act on his part is required, and the officer, in making a levy or sale, must be regarded as a wrongdoer, and held answerable, as such, unless the debtor has, by his express waiver, or by acts of acquiescence equivalent thereto, estopped himself from insisting on his right of exemption.[69]

In North Carolina, it is said that the officer may levy on any property, unless he knows it to be exempt.[70] In Tennessee, it is presumed, until the contrary is shown, that the debtor did not waive his rights. The officer, where property is clearly exempt, can justify a levy only by showing the consent of the defendant thereto.[71] In Wisconsin and Massachusetts, officers are required to know the exemption laws, and interfere at their peril when property is clearly exempt.[72] So in Ohio, the officer must take notice that there are certain articles which are necessarily exempt.[73] In Michigan, where property is unconditionally exempt, the officer must not take it, and, where it is exempt up to a certain value, he must have an appraisement made.[74] In Illinois and Missouri, an officer about to levy must inform the defendant of his rights, and give him an opportunity to select the property which he

[69] Cole v. Green, 21 Ill. 104; Harrington v. Smith, 14 Colo. 376, 20 Am. St. Rep. 272.

[70] Henson v. Edwards, 10 Ired. 43.

[71] State v. Haggard, 1 Humph. 390.

[72] Gilman v. Williams, 7 Wis. 329, 76 Am. Dec. 219; Maxwell v. Reed, 7 Wis. 582; Woods v. Keyes, 14 Allen, 236, 92 Am. Dec. 765.

[73] Frost v. Shaw, 3 Ohio St. 270.

[74] Elliott v. Whitmore, 5 Mich. 532; Wyckoff v. Wyllis, 8 Mich. 48.

Digitized by Google

will claim as exempt;[75] and a delivery bond obtained from defendant without first notifying him of his rights is invalid.[76] In Tennessee and Texas, the exemption for the heads of families, being created for the benefit of the whole family, is an absolute right which need not be claimed and cannot be waived.[77] In Mississippi, the officer, in a case of doubt, may summon three disinterested citizens to decide. Failing to do this, he is responsible as a trespasser if the property levied on can be shown to be exempt.[78] Wherever the rule of law prevails that all property is prima facie liable to execution, it necessarily follows that in all legal controversies involving a claim to exemption, the onus of proof is on the claimant. He must show affirmatively every fact necessary to support his claim.[79]

§ 212. Claiming Benefit of Exemption.—In those states where the exemption laws are considered as conferring a mere personal privilege, which must be claimed by the defendant, the first inquiry necessarily is, How, when, and by whom must the claim be made? As the privilege is personal, the claim must be made by the defendant or by some one acting for him by author-

[75] People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418; State v. Romer, 44 Mo. 99; Bingham v. Maxcy, 15 Ill. 290; State v. Barada, 57 Mo. 562; Foote v. People, 12 Ill. App. 94; Shear v. Reynolds, 90 Ill. 238.

[76] Robards v. Samuel, 17 Mo. 555.

[77] Ross v. Lister, 14 Tex. 469; Denny v. White, 2 Cold. 283, 88 Am. Dec. 596.

[78] Perry v. Lewis, 49 Miss. 443.

[79] Calhoun v. Knight, 10 Cal. 393; Briggs v. McCullough, 36 Cal. 542; Dowling v. Clark, 3 Allen, 570; Davenport v. Alston, 14 Ga. 271; Corp v. Griswold, 27 Iowa, 379; Van Sickler v. Jacobs, 14 Johns. 434; Griffin v. Sutherland, 14 Barb. 456; Dains v. Prosser, 32 Barb. 290; Tuttle v. Buck, 41 Barb. 417; Line's Appeal, 2 Grant. Cas. 197; Swan v. Stephens, 99 Mass. 7; Rollins v. Allison, 59 Vt. 188.

Digitized by Google

ity, express or implied.[80] The general language employed in some of the cases is to the effect that the defendant must make the claim in person—that it cannot be made by an agent. But we apprehend that the true rule must be this: that no one has a right to interfere officiously on behalf of the defendant; and that even an agent in custody of the property has not, by virtue of his general authority as agent or bailee, any power to make the claim. When, however, the defendant has resolved to claim his exemption, we can see no objection to his doing so by means of an attorney or agent, acting in his name and in pursuance of his instructions. Nor do we perceive any reason why his agents, whether such agency is evidenced by an expressed delegation of his authority, or implied from their relationship to him, or from their being put in charge of the property, may not, in his absence, and therefore without his knowledge, interpose a claim in his behalf.[81] Otherwise the debtor's family is, in his absence, helpless as against a threatened seizure of their household effects, provisions, and wearing apparel, and must remain naked and unfed, unless relieved by charity, until the debtor can be communicated with, and has thereupon announced his election that they should not be thus despoiled. But what if he does not thus elect? Husbands there have been, and may again be, who are inattentive to their wives and children, or who willfully inflict upon them misery and want. The family of such a man, more than of any other, is within the spirit and the necessities

[80] Mickes v. Tousley, 1 Cow. 114; Smith v. Hill, 22 Barb. 656; Earl v. Camp, 16 Wend. 562; Wygant v. Smith, 2 Lans. 185; Lackland v. Rogers, 113 Ala. 529.

[81] Frazier v. Syas, 10 Neb. 115, 35 Am. Rep. 466; Regan v. Zeeb, 28 Oh. St. 487; Wilson v. McElroy, 82 Pa. St. 82.

Digitized by Google

of exemption laws; and it is a strange and perverse interpretation of these laws which denies their benefit, even temporarily, to a family whose head is for the moment absent from them, or who, though not absent, is indifferent to their fate. A statute of Ohio declared "that it shall be lawful for any resident of Ohio, being the head of a family, and not the owner of a homestead, to hold exempt from levy and sale, personal property, to be selected by such person, his agent or attorney, at any time before sale, not exceeding five hundred dollars in value, in addition to the amount of chattel property now by law exempted." An action was brought under this statute by a wife, her husband joining, to recover damages sustained by the refusal of a constable to set off property as exempt from execution on her demand. Why the demand was not made by the husband, and the action prosecuted solely in his name, does not appear. The court construed the statute as made to protect the family, and therefore saw no reason why the wife "may not make the demand for the benefit of herself and children, as she is their natural guardian for nurture of her children." [82] By the statutes of Iowa, "when a debtor absconds and leaves his family, such property shall be exempt in the hands of the wife and children, or either of them." [83] His wife has, therefore, on his absconding, the right to claim the exempt property, and where he has several articles, some only of which can be retained as exempt, she is authorized, in her discretion, to select which shall be so retained.[84] The statutes of Missouri also provide for the wife of

[82] Regan v. Zeeb, 28 Ohio St. 487; Noyes v. Belding, 5 S. D. 603.
[83] Code Iowa, § 4016.
[84] Malvin v. Christoph, 54 Iowa, 562.

Digitized by Google

an absconding husband by authorizing her to demand the exemptions to which he would be entitled, had he remained in the state, and, on the refusal of such demand, to enforce it by appropriate action.[85] Her rights are, however, lost by her on her ceasing on her own part, to be a resident of the state.[86] In the absence of a husband from the state, though no special statute has been enacted for the protection of his wife and the other dependent members of his family remaining therein, we think it is a fair inference from the general exemption laws, and the purposes to be subserved by them, that the member of his family, who has become its de facto head, is entitled, when a writ is attempted to be levied upon his property, to claim and hold so much thereof as the law declares to be exempt from execution.[87] In Pennsylvania numerous decisions have been made, under which it is clearly settled that in the absence of the defendant a claim for the benefit of exemption and appraisement may be made by his wife, or by any other adult member of his family, or by any other person, placed by him in the charge of the property.[88]

Where a debt is sought to be garnished, it has been held that the garnishee cannot interpose the defense that it is by law exempt from execution, for the reason that the writ of execution is personal to the defendant in execution, and hence cannot be urged by

[85] Lindsey v. Dixon, 52 Mo. App. 291.

[86] Steele v. Leonri, 28 Mo. App. 675.

[87] Freehling v. Bresnahan, 61 Mich. 540, 1 Am. St. Rep. 617; Frazier v. Syas, 10 Neb. 115, 35 Am. Rep. 466.

[88] Miller v. McCarthy, 28 Leg. Int. 221; Taylor v. Worrell, 4 Leg. Gaz. 401; Meltzler v. Helfrinch, 5 Leg. Gaz. 173; 30 Leg. Int. 216; Waugh v. Burket, 3 Grant Cas. 319; Wilson v. McElroy, 32 Pa. St. 82; McCarthy's Appeal, 68 Pa. St. 217; Meltzler's Appeal, 73 Pa. St. 368.

Digitized by Google

another.[89] It is doubtless true that the defendant may waive his exemptions if he chooses to do so, but to deny the garnishee the right to claim the exemption on behalf of the defendant, at least until he has notice of the garnishment and an opportunity to resist it, would, in many cases, destroy, or substantially impair, the right of exemption, and we think the better rule to be that a garnishee may, and ought to, present the claim for the exemption where he is aware of its existence.[90] The property sought to be levied upon may be in possession of a pledgee, mortgagee, or other person to whom it has been transferred as security only. He is not entitled to determine the question whether the property will be claimed as exempt or not, and, therefore, cannot make a valid claim for its exemption, especially if the debtor has had an opportunity to interpose such claim and has not done so.[91]

There is not, unless prescribed by statute, any set form in which to claim an exemption.[92] It may be written or unwritten.[93] It is sufficient if it gives the

[89] Moore v. Chicago etc. R. R. Co., 43 Ia. 385; Osborne v. Schutt, 67 Mo. 712; Howland v. Chicago etc. R. Co., 134 Mo. 474; Conley v. Chilcote, 25 Oh. St. 320.

[90] Post, § 416.

[91] Terry v. Wilson, 63 Mo. 493; Sherrible v. Chaffee, 17 R. I. 175, 33 Am. St. Rep. 863.

[92] Diehl v. Holben, 39 Pa. St. 213; Keller v. Bricker, 64 Pa. St. 379; Bassett v. Inman, 7 Colo. 270; Braswell v. McDaniel, 74 Ga. 319.

[93] Keller v. Bricker, 64 Pa. St. 379; Hart v. Hart, 167 Pa. St. 13; McCluskey v. McNeely, 3 Gilm. 578; Simpson v. Simpson, 30 Ala. 225; Bowman v. Smiley, 31 Pa. St. 225, 72 Am. Dec. 738; Gamble v. Reynolds, 42 Ala. 236. In the last-named state, if any moneys or choses in action are garnished which the defendant desires to claim as exempt, he must file a verified claim in the court whence the writ issued, showing specifically what other personal property he has, and its value, and where situated. Code Ala., sec. 2533; McBrayer v. Dillard, 49 Ala. 174; Tod v. McCravey's Adm'r, 77 Ala. 468.

Digitized by Google

officer to understand that the property upon which he has levied, or is about to levy, is exempt from execution, and that the defendant desires to avail himself of the exemption. Regarding the time within which the right to exemption must be claimed, there is some difference of opinion. The rule most generally recognized is, that the claim will, under ordinary circumstances, not be too late, if made at any time previous to the sale.[94] Certainly, expenses may be incurred by the plaintiff in execution in caring for property levied upon and in making advertisements, and doing other acts necessary to a valid sale, and delay on the part of the defendant in claiming his right of exemption, must, to some extent, operate prejudicially to the plaintiff, and is hence often claimed to estop him from asserting his exemption privileges. Possibly there may be cases in which the delay of the defendant is not consistent with good faith on his part, or is inconsistent with any other assumption that he has deliberately waived his exemption, and intends that the plaintiff shall act upon such assumption. We are not sure that the defendant may not, by his acquiescence, be estopped from urging his claim, but if so, the circumstances must be of an extreme character, and the decisions have almost universally refused to give effect to the alleged estoppel where the claim of the defendant was interposed before the sale of the

[94] Bray v. Laird, 44 Ala. 295; Boylston v. Rankin, 114 Ala. 408; Pyett v. Rhea, 6 Heisk. 136; Pate v. Swann, 7 Blackf. 500; McGee v. Anderson, 1 B. Mon. 189, 36 Am. Dec. 570; Chesney v. Francisco, 12 Neb. 626; Shepherd v. Murrill, 90 N. C. 208; Rice v. Nolan, 33 Kan. 28; McMichael v. Grady, 34 Fla. 219; Frey v. Butler, 52 Kan. 722; Close v. Sinclair, 38 Ohio St. 530; State v. Emmerson, 74 Mo. 607. It has been held that the right may be successfully claimed after the commencement of the sale. State v. Emmerson, 74 Mo. 607.

Digitized by Google

property.[95] But in Pennsylvania it must be interposed more promptly. In that state, a defendant having knowledge of a levy upon his property, must not by his inaction suffer the plaintiff to incur trouble and expense in preparing for a sale under the writ. After the property has been advertised for sale, the claim for exemption is in that state generally treated as irrevocably waived,[96] except in cases where the debtor had no knowledge of the levy. He cannot be treated as in default, and his rights cut off, when he has no notice of their peril.[97] In Iowa the rule formerly prevailed that a debtor, if present at the time of the levy, must then assert his exemption rights. His voluntary surrender of the property to the officer was irretrievable.[98] "We are of opinion," said the court, "the debtor cannot stand by and know the levy is about to be made, and afterward claim the exemption. He must, at the time, in some manner, indicate to the officer his purpose to claim the property as exempt."[99] The code of that state has changed the pre-existing law

[95] McMichael v. Grady, 34 Fla. 219; Robinson v. Hughes, 117 Ind. 293, 10 Am. St. Rep. 45; Dennis v. Beufer, 54 Kan. 527; State v. Carson, 27 Neb. 501, 20 Am. St. Rep. 681; Noyes v. Belding, 5 S. D. 603.

[96] Dieffenderfer v. Fisher, 3 Grant Cas. 30; Blair v. Steinman, 52 Pa. St. 423; Bowyer's Appeal, 21 Pa. St. 210; Kensel v. Kern, 4 Phila. 86; Neff's Appeal, 21 Pa. St. 247; Yost v. Heffner, 69 Pa. St. 68; Commonwealth v. Boyd, 56 Pa. St. 402. As to property garnished, see Landis v. Lyon, 71 Pa. St. 473; Zimmerman v. Briner, 50 Pa. St. 535. In the case of real estate, the claim should be made before the inquisition. Miller's Appeal, 16 Pa. St. 300; Brant's Appeal, 20 Pa. St. 141; Yardley v. Holby, 1 T. & H. Pr. 1089; Gibbons v. Gaffney, 154 Pa. St. 48; Williamson v. Krumbhar, 132 Pa. St. 455.

[97] Howard B. & L. A. v. P. & R. R. R., 102 Pa. St. 220.

[98] Richards v. Haines, 30 Iowa, 576.

[99] Angell v. Johnson, 51 Iowa, 626, 33 Am. Rep. 152; Moffitt v. Adams, 60 Iowa, 44.

Digitized by Google

upon this subject. It declares that "any person entitled to any of the exemptions mentioned in this section does not waive his rights thereto by failing to designate or select such exempt property, or by failing to object to a levy thereon, unless failing or refusing to do so when required to make such designation or selection by the officers about to levy." [100] "Under this statute, the mere silence of the defendant at the time of the levy, and for two weeks thereafter, cannot estop him from asserting his right of exemption." [101]

Where property is seized under attachment, and, by the rules of procedure in force, a judgment may be entered directing the sale of the property, the debtor's rights are determined by such judgment, and he cannot afterward claim his exemption. The rule applicable to such a case has been thus stated and explained: "The property, which it is sought to have released, is not held by defendant under execution, but by virtue of an order of sale duly issued in an attachment proceeding from a court of competent jurisdiction. It is in custody of the law, and under the solemn judgment of a court, and so long as that judgment stands unreversed, it is entitled to our respect in all collateral proceedings. When the property was seized in attachment, if the relator claimed and desired to hold it as exempt, he should have brought the matter to the attention of the court in whose custody it was, and thus have obtained its release; or if he preferred so to do, he could at any time before final judgment against him

[100] Code Iowa, sec. 4017.
[101] Ellsworth v. Savre, 67 Iowa, 450.

Digitized by Google

have replevied it from the officer, in whose possession it was." [102]

Where the officer has several writs in his hands against the same defendant at the same time, one demand for exemption is probably sufficient; but as to successive writs the rule is different, and a claim for exemption must be made against each writ.[103] If, at different times, writs of execution are issued on the same judgment; the defendant is entitled, as against each, to the benefit of the exemption laws, existing at the date of the respective levies, and a levy under a writ in disregard of a claim of exemption cannot be justified upon the ground that, when a prior writ was issued on the same judgment, the defendant claimed, and had set apart to him, the full amount to which he was then entitled. If he has disposed of such property, he cannot be required to account for it, and his claim for exemption must be treated as though he had never before had the benefit of his exemption privileges.[104] Whenever the law prescribes a method by which the claim for exemption shall be made, a compliance with the method is indispensable to the preservation and assertion of the right.[105] Occasional cases must necessarily arise in which a claim for exemption is not interposed, because of the ignorance of the defendant that his rights are in jeopardy. This may happen from sickness or temporary absence, and also from other causes,

[102] State v. Krumpus, 13 Neb. 321; State v. Manly, 15 Ind. 8; Perkins v. Bragg, 29 Ind. 507. For rule in Pennsylvania, see Bittenger's Appeal, 76 Pa. St. 105; Howard B. & L. A. v. P. & R. R. R., 102 Pa. St. 220; Cornman's Appeal, 90 Pa. St. 254.

[103] Strouse v. Becker, 38 Pa. St. 190, 80 Am. Dec. 474; Bechtel's Appeal, 2 Grant Cas. 375; Dodson's Appeal, 25 Pa. St. 232.

[104] Re Krauter's Estate, 150 Pa. St. 47.

[105] Crow v. Whitworth, 20 Ga. 38; Gavitt v. Doub, 23 Cal. 79; Gresham v. Walker, 10 Ala. 370; Commonwealth v. Boyd, 56 Pa. St. 402.

Digitized by Google

sufficient in their nature to fully exonerate the defendant from the charge of laches or of willful inattention. The question very naturally arises whether, in such circumstances, his right of exemption is lost. The decisions on the subject are not sufficiently numerous to warrant any positive answer to this question. In Alabama it is settled that the right of exemption, unless claimed, is lost, although the defendant never knew that his property had been levied upon.[106] In California, an action was sustained for selling exempt property, the debtor having been absent on account of sickness at the time of the levy and sale, and having thereby been prevented from claiming the exemption. But in this case it was shown that the plaintiff in execution was aware of the rights of the debtor, he having claimed and procured the release of the same property when taken under a previous writ, issued to enforce the same judgment.[107] The right of the debtor to make an effective claim for exemption cannot be cut off by any act of the officer having that object in view, as by his prematurely paying over the money on the execution before the levy was completed by a proper notice to the defendant in execution, so as to enable him to make a seasonable demand.[108]

In several of the states proceedings of a more formal character than those here pointed out are necessary to entitle the debtor to his exemption, and to sustain an action against an officer or other person disregarding his rights. These statutes will be considered elsewhere.[109]

[106] Bell v. Davis, 42 Ala. 460.
[107] Haswell v. Parsons, 15 Cal. 266, 76 Am. Dec. 480.
[108] Wylie v. Grundyson, 51 Minn. 360, 38 Am. St. Rep. 509.
[109] Post, § 213.

Digitized by Google

§ 212 a. Claiming the Right of Selection.—The debtor may have more of a particular kind of property than is exempt from execution. In this event, he has the right to select which he will claim.[110] The law will not permit the levying officer to make the selection, for, if it did, he would doubtless substantially impair the debtor's right of exemption by leaving him the least valuable of the exempt articles.[111] Where the defendant has more of any particular class of property than he can hold as exempt, his discretion in selecting the members of this class cannot be controlled by an officer levying, or seeking to levy, the writ. If some of the articles are much more valuable than others, the officer has no right to insist that the exemption be accepted out of the less valuable.[112] If some of them are subject to a mortgage or other lien, he cannot compel the debtor to retain the articles so incumbered, and to surrender others.[113] In a few of the states, the failure of the debtor to claim his exemption, or to select the property which he will retain as exempt, does not justify the officer in taking his exempt property. The right of exemption must, nevertheless, be

[110] Bray v. Laird, 44 Ala. 295; Good v. Fogg, 61 Ill. 449, 14 Am. Rep. 71; Parker v. Canfield, 116 Mich. 94; Cutler v. Thomas, 74 N. C. 51; State v. Haggard, 1 Humph. 390; Finnin v. Malloy, 33 N. Y. Sup. Ct. 382; Elliott v. Flanigan, 37 Pa. St. 425; Austin v. Swank, 9 Ind. 109; Lockwood v. Younglove, 27 Barb. 505; Fuller v. Sparks, 39 Tex. 136; Bingham v. Maxcy, 15 Ill. 290; Pyett v. Rhea, 6 Heisk. 136. But the officer is not liable for selling all where the debtor does not demand the right to select what is exempt. Nash v. Farrington, 4 Allen, 157; Clapp v. Thomas, 5 Allen, 158.

[111] Parker v. Haley, 60 Iowa, 325; Bayne v. Patterson, 40 Mich. 658.

[112] Conway v. Roberts, 38 Neb. 456; Fuller v. Sparks, 39 Tex. 136.

[113] Bayne v. Patterson, 40 Mich. 658; Greenleaf v. Sanborn, 44 N. H. 17; Richardson v. Chase, 64 N. H. 617.

Digitized by Google

respected, and the officer is, by law and the inaction of the debtor, made his agent for the purpose of selecting the property to be held as exempt and, after such selection, the remainder may be sold.[114] The right to select need not be claimed in any prescribed form. It is sufficient that the debtor shows a preference for the property taken, and urges the hardship of the officer's seizing it, rather than the other property then present, which the debtor states to be less valuable or useful to him.[115] The right of selection may be claimed orally, as well as in writing.[116] The form of the demand is immaterial. It will be construed with great liberality, and will be adjudged sufficient, if its terms are such that an officer of ordinary intelligence would understand therefrom which of the chattels, upon which a levy has been made, or threatened, the debtor prefers to retain as exempt.[117]

The right of selection must be so exercised as not to work a fraud upon the creditor, by permitting the debtor to select as exempt that which has been levied upon, and at the same time conceal or dispose of other property, which might have been levied upon, had the right of selection been promptly exercised. If the defendant has a greater number of chattels of any kind than is exempt from execution, and removes or conceals any of them to avoid a levy thereon, this is conceded to be an irrevocable election to claim as exempt the property so removed or concealed, and he

114 Slaughter v. Detiney, 10 Ind. 103; Wyckoff v. Wyllis, 8 Mich. 49; McCoy v. Brennan, 61 Mich. 362, 1 Am. St. Rep. 589; Hogan v. Neumeister (Mich.), 76 N. W. 65.

115 Clark v. Bond, 7 Baxt. 288.

116 McCluskey v. McNeely, 3 Gilm. 582; Simpson v. Simpson, 30 Ala. 225; Finnin v. Malloy, 33 N. Y. Sup. Ct. 390.

117 See cases last cited. Northrup v. Cross, 2 N. D. 433.

Digitized by Google

will not be permitted to afterward claim, in its stead, property levied upon. But some of the authorities insist that as long as the defendant does no affirmative act to keep property out of the officer's way, he may select as exempt the property levied upon, without tendering for levy the other chattels in his possession of the same class as those levied upon.[118] The better rule, as we conceive, when there are several articles, out of which the debtor has the right to select a certain number as exempt, is that he must, on being informed of the levy, or within a reasonable time thereafter, point out to the officer not only those which he selects as exempt, but also those which remain, and tender the latter to the officer, or at least give him an opportunity to levy thereon.[119] In adopting this rule, the supreme court of California said: "We should not lose sight of the beneficent objects of the exemption laws, or do or say aught to abridge the rights secured thereby. On the other hand, the wise provisions of these laws should not be used as a means for unjustly shielding property not exempt from the claims of creditors. It is quite proper to give the debtor a reasonable time, within which to make his selection of that which he will claim, but if he does not do so at the time a levy is made, the opportunities and temptations to dispose of the property not levied upon, or place it beyond the pale of the law, and then claim as exempt that which has been taken in execution, becomes great, and, if yielded to, may result in a fraud upon creditors. If the exemption is claimed at the time of the levy, there being other property of the

[118] Ross v. Hannah, 18 Ala. 125; Bray v. Laird, 44 Ala. 296.

[119] Fuller v. Sparks, 39 Tex. 136; Smothers v. Holly, 47 Ill. 331; Bonnell v. Bowman, 53 Ill. 460.

Digitized by Google

same kind not claimed, it is reasonable to suppose the officer holding an execution will levy upon that not claimed, and his opportunity to do so shall not be abridged by reason of the claims of exemption being asserted at a later date. We hold, therefore, where, as in this case, the debtor has more property of a particular kind liable to seizure than is exempt from execution, and a writ is levied upon a portion only thereof, leaving as much as is by law exempt, and thereafter the debtor for the first time claims as exempt the property levied upon, or a portion thereof, and leaving in the hands of the officer a less quantity than is necessary to satisfy the writ, then, and in that case, the debtor, to make good his claim of exemption, must offer to surrender to the officer the other property in his hands of the same general kind, subject to execution, or so much thereof as may be necessary to satisfy the writ; and, failing to do so, he is not entitled to recover against the officer." [120] In Minnesota, however, it is settled that a defendant wishing to claim a horse as exempt is entitled to do so without bringing other horses from another county in which they are, and offering the officer an opportunity to levy thereon.[121]

If the property, on which an officer has levied, is unquestionably exempt, the debtor not having other chattels of the same kind so as to present the necessity of his electing as between two or more which he will claim as exempt, his right to exemption cannot be denied because of his not tendering for levy other

[120] Keybers v. McComber, 67 Cal. 395.
[121] Anderson v. Ege, 44 Minn. 216.

Digitized by Google

chattels of a different class not exempt from execution.[122]

The defendant is always entitled to a reasonable time in which to determine what property he will claim as exempt.[123] With respect to what is a reasonable time, the rule is more strict than in the case of a mere claim for exemption. When the right of the debtor to an exemption has not been denied, and the only question is whether he will select as exempt the property which has been seized, rather than that which has been left in his possession, he must exercise reasonable diligence.

In California, a debtor, having more horses than by law were exempt, suffered a levy on part of them to be made, and possession of the property to be retained for four months, when he claimed the right to select those levied upon as exempt. It was held that his right of selection had been lost by his unreasonable delay in exercising it.[124] The selection "must be done so promptly as not to mislead the officer into the belief that the owner acquiesces in the selection which has been made."[125] It has been said that "this selection should be made by the debtor at the time of the levy if he be present; but, if not present, he should make the selection and notify the officer within a rea-

[122] Amend v. Murphy, 69 Ill. 337.

[123] Elliott v. Flanigan, 37 Pa. St. 425; Austin v. Swank, 9 Ind. 109; Pyett v. Rhea, 6 Heisk. 136.

[124] Borland v. O'Neal, 22 Cal. 504.

[125] Savage v. Davis, 134 Mass. 401. In Illinois, the officer may notify the defendant that he holds an execution against him, and will at a time and place designated levy the same. If the defendant neglects to be present for the purpose of making a selection of property to withhold from the levy, he loses the "right to come in, on a day subsequent to the levy, and make a selection of the property he desired to claim." Wright v. Deyoe, 86 Ill. 490.

Digitized by Google

sonable time thereafter, and before the sale."[126] To require an immediate selection is perhaps too harsh, as it may coerce the debtor into acting while he is surprised and disconcerted by the seizure, and has not reflected sufficiently to exercise a wise forethought. But if he does not make his selection then, he must certainly do so without needless delay, after having notice of the levy.[127] As the exemption laws are in all of the states liberally construed, it is obvious that the courts will be reluctant to deny a defendant the right to make a selection, unless his inaction indicates bad faith on his part, or is not excusable or not accounted for, and has been so long continued that, to permit his tardy action, must operate unjustly toward the plaintiff in the writ. The proper course to be pursued by an officer on levying a writ is to insist that the defendant, if present, then exercise his right of selection. Where the defendant has not thus, or in some other manner, been called upon to act, he retains his right of selection in ordinary circumstances up to the time of the sale, on tendering to the officer the property remaining in the defendant's hands, subject to execution.[128] If, on being notified by the officer to appear at a designated time and make his selection, the debtor declines the opportunity, he waives his right to select.[129] An officer about to levy a writ found

[126] Frost v. Shaw, 3 Ohio St. 274; Cook v. Scott, 1 Gilm. 342.

[127] Zielke v. Morgan, 50 Wis. 560.

[128] Harrington v. Smith, 14 Colo. 376, 20 Am. St. Rep. 272; Pyett v. Rhea, 6 Heisk. 136.

[129] Butt v. Green, 29 Ohio St. 667. In a case where the debtor had two cows, one of which was exempt, and he delayed for some five or six days to make a selection, the following instruction to the jury was approved: "The plaintiff had the right of election as to which cow should be exempt under the statute. If he failed to elect in a reasonable time, the officer would have the right to make

Digitized by Google

the defendant in the possession of three horses, upon one of which a levy was made. The defendant claimed it as exempt, but refused to make any selection between it and the other two, on the ground that the title in them was in one Allen, and whether defendant had any interest in them could be ascertained only on a settlement between him and Allen. Trover was subsequently brought for the horse. At the trial, it was proved that defendant owned the three horses, but it did not appear that his ownership had not been dependent on his settlement with Allen, nor that he had sought to mislead the officer. The claim of the horse levied upon was adjudged to be a sufficient selection of it as exempt. The fact that he did not acknowledge the ownership of the others was, under the circumstances, immaterial.[130] If the whole of the property of the debtor, or of any particular class thereof, is exempt from execution, the law may be regarded as having made a selection for him. An officer levying the writ is charged with knowledge of the law and of the selection thus made by it, and cannot proceed, though the debtor does not state that he wishes to retain all of the property so selected for him by the law.[131]

Sometimes the statute permits the debtor to hold as exempt an article of a designated value, and the ar-

an election for him, and he would be bound by the officer's election. It is a question for the jury to determine whether the plaintiff exercised his right of election within a reasonable time under all the circumstances of the case; that if he did not so elect within a reasonable time, and they should find that the officer, in good faith, made an election for him, then the plaintiff would be bound by such selection." The jury returned a verdict for the defendant. Savage v. Davis, 134 Mass. 403.

[130] Plimpton v. Sprague, 47 Vt. 467.

[131] Harrington v. Smith, 14 Colo. 376, 20 Am. St. Rep. 272; Stirman v. Smith (Ky.), 10 S. W. 131; State v. Haggard, 1 Humph. 390.

Digitized by Google

ticle of the class named owned by him is of greater value, and not capable of division into parts. In such a case it is not possible for him to make any selection. In truth, the article which he owns, because of its value, does not belong to the class designated in the statute, and hence is not exempt from execution, and the debtor is neither entitled to retain it on tendering to the officer its value above the amount exempt, nor to have such amount paid to him from the proceeds of the sale.[132]

Sometimes, by statute, the designation of the property selected as exempt from execution, whether made by the defendant or by the officer, is required to be in some manner more formal than herein suggested, or one or the other is required to make some schedule, either of all the debtor's property subject to execution, or of such as is selected as exempt. This subject will receive further consideration in the following section.

§ 213. Listing, Scheduling, and Appraising Exempt Property.—Whenever the property which the debtor may retain as exempt does not appear as a matter of law, but must be ascertained by some method of selection, it is important that the law should designate the method, and provide the means for carrying it into effect. If he is allowed property of a specified value, some mode of valuation should be declared by the statute, so that it may be known when the debtor has received his exemptions, and that the residue of his property is subject to execution; and, when the property which he may retain is not measured by value, but by the number of a designated class of articles, which are made exempt, there should also be some

[132] Waldo v. Gray, 14 Ill. 184.

Digitized by Google

mode of designating these articles, and thus, in effect, setting apart the residue as subject to the writ. In cases of the latter class, in a majority of the states, it is, as we have shown, sufficient for the debtor to indicate to the levying officer, in any appropriate manner capable of being understood by a person of ordinary comprehension, which of the articles he desires to claim as exempt. Some of the states have, however, by statute, provided for a more formal course of proceeding, and one which, though it may involve parties in greater expense and trouble, is calculated in the end to more accurately define and more completely protect their rights. In some of the states the mode of procedure is of so formal and complex a character, and so difficult to be pursued, that it is altogether inappropriate for the protection of the humble and improvident, who have the greatest need for the benefits of the exemption laws. We cannot read some of these statutes without harboring a suspicion that they were artfully and cruelly designed for the purpose of making a compliance with the exemption laws too tedious and expensive to be resorted to by debtors of humble circumstances and environment.

In Alabama, any resident of the state entitled to the exemption from levy and sale of any property, whether real or personal, may, at any time, make and file in the office of the judge of probate of the county in which the property is situate, if a homestead, or, if personal property, of the county in which the debtor resides, a declaration in writing, subscribed and sworn to by him, describing the property selected and claimed by him as exempt, item by item, in case of personal property, with its value, and other declarations may, from time to time, as occasion may require, be filed by

Digitized by Google

him.[133] The claim so made must be recorded, and the record operates as notice of its contents and it "shall be taken and considered as prima facie correct."[134] After the filing of the claim, the property described therein is not subject to levy, "unless there is endorsed on the process the fact that there has been a waiver of exemption as to the kind of property on which the levy is sought to be made, or the claim is contested."[135] If the plaintiff wishes to contest the claim, he may make and file, with the officer holding the process, an affidavit stating his belief, either that the claim is altogether invalid, or is invalid in part or excessive, specifying wherein the invalidity or excess exists; and, if the right to levy on personal property is claimed, the plaintiff must deliver to the officer a bond in double the value of the property sought to be levied upon, conditioned that if the plaintiff fails in his contest, he will pay the defendant all such costs and damages as he may sustain by reason of the wrongful institution of the contest.[136] The right of exemption is not lost by the failure to file the claim before the levy of process. A defendant who has not, before such levy, filed his claim, may, at any time before the sale, file with the levying officer a verified statement in writing, describing the property claimed as exempt. Notice of this statement must be given by the officer to the plaintiff within three days, who may, within ten days after receiving such notice, contest the claim without giving bonds.[137] On the contest of a claim to the exemption of personal property,

[133] Code Ala., § 2515, ed. 1886.
[134] Ib. §§ 2516, 2517.
[135] Ib. § 2519.
[136] Ib. § 2520.
[137] Ib. § 2521.

Digitized by Google

the plaintiff may, at any time before the first of the term of the court to which the process is returned, demand in writing that the defendant, within three days of the term, file a full, complete, verified inventory of his personal property, except wearing apparel, portraits, pictures, and books specifically exempted from sale, with the value and location of each item of such property, and of all money belonging to him, and of all debts and choses in action in which he is interested, with the value of each of them, and if the defendant does not file such inventory, his claim may be disregarded, unless good and sufficient cause be shown to the contrary.[138] If the inventory filed by the defendant, in response to the plaintiff's demand, shows personal property not claimed as exempt, the defendant must, at the filing of the inventory, deliver such property to the officer to be sold under execution.[139] If the claim is, upon the trial, found to be excessive, the jury must also ascertain what portion is exempt, describing the same with its value, approximating in value, as near as practicable, one thousand dollars, and the residue shall be sold.[140] If the claim of exemption filed with the levying officer is contested by the plaintiff, and the jury finds in favor of the defendant, this is conclusive only that the property was not subject to levy at the time it was seized. Subsequent levies may be made upon the same property, against which the defendant can protect himself only by the filing of his declaration with the probate judge.[141] In the absence of the filing of a claim with

[138] Trager v. Felleman, 95 Ala. 66; Young v. Hubbard, 102 Ala. 373.

[139] Ib. § 2536.

[140] Ib. § 2529.

[141] Block v. George, 83 Ala. 178.

Digitized by Google

the probate judge, personal property, though exempt, is subject to levy, and, if not thereafter claimed as in the code provided, is subject to sale.[142] The claim for exemption may be made at any time prior to the sale of the property claimed.[143]

In Arkansas, a defendant desiring to claim the exemption from execution of personal property must prepare a verified schedule of all his property, including moneys, credits, and choses in action held by himself, or others for him, and specifying the particular property which he claims as exempt, and, after giving five days' notice in writing to the opposite party, his agent, or attorney, file the same with the justice or clerk, issuing the execution. It thereupon becomes the duty of the officer with whom the claim is filed to issue a supersedeas, staying the sale. If the debtor has property not claimed in his schedule, it may be levied upon. If it appears from the schedule that the debtor has more property than is exempt, he must select his exemptions, after which the remainder becomes subject to levy. On application of the plaintiff, the justice or clerk must at once appoint three disinterested appraisers to appraise the property claimed as exempt. If they determine that such property is exempt, it must be surrendered to the defendant. If, on the other hand, they find that the claim is excessive, they must designate the excess, which may then be sold. Either party may appeal to a court from the decisions of the appraisers.[144] The debtor cannot, unless he has made the schedule required by

[142] Mitchell v. Corbin, 91 Ala. 599.

[143] Boylston v. Rankin, 114 Ala. 408, 62 Am. St. Rep. 111.

[144] Sandels & Hill's St. Ark., §§ 3718 to 3727; Friedman v. Sullivan, 48 Ark. 213; Chambers v. Perry, 47 Ark. 400; Taylor v. Tomlinson, 65 Ark. 232.

Digitized by Google

the statute, maintain an action against the levying officer for the recovery of property, claimed to be exempt.[145] If the schedule is filed as required, the failure of the debtor to give the plaintiff notice of the filing is not fatal to the exemption, if the latter, in fact, has such notice and appears in opposition to the claim.[146] It is not sufficient for the defendant to make a mere schedule of his property with an estimate of its value, without declaring that he is a resident of the state and claims the property, or some part of it, as exempt.[147] The schedule must be made and the claim interposed within a reasonable time after the levy, or, at all events, prior to the sale, and if a sale is permitted without any claim, the debtor cannot afterward claim and hold as exempt the proceeds of the sale.[148]

[145] Settles v. Bond, 49 Ark. 144.

[146] Brown v. Doneghey, 46 Ark. 497; Garrett v. Wade, 46 Ark. 493.

[147] Guise v. State, 41 Ark. 249; Brown v. Peters, 53 Ark. 182.

[148] Surratt v. Young, 55 Ark. 447. In deciding this question, the court said: "Prima facie, all the property of the debtor is subject to sale on execution for the payment of his debts. But the constitution confers upon him the privilege of claiming specific articles of his property as exempt from execution, and the statute points out particularly the manner in which this must be done, and provides that when it is thus done, a supersedeas shall be issued to prevent the sale of the property thus selected as exempt. If the debtor were permitted to stand by and see his property sell without claiming his exemptions in specific articles, and then be allowed to claim the amount in value of his exemptions out of the proceeds of the sale of his property, it is not difficult to see how he might work this to the prejudice of his creditor, and how an improvident and thriftless man, by permitting the sale of his property exempt by law from execution, and necessary for the use of his family, might thwart the purpose of the law in securing the right to a debtor to claim his exemption. We do not think that the statute confers upon a debtor the right to claim his exemptions out of the proceeds of the property after it is sold under the process of the court, or under an order of the court, as in this case, when he has an opportunity to, and might claim, his exemptions in specific articles as provided by the statute."

Digitized by Google

By the code of Georgia, every person seeking the benefit of the exemptions provided for by the constitution of that state must apply by petition to the ordinary of the county in which he resides, stating for whom the exemption is claimed; if for the head of a family, disclosing the names and ages of the members thereof, and stating out of what and whose property the exemptions are claimed. The petition must be accompanied with a verified schedule containing a minute and accurate description of all property, real and personal, belonging to the person from whose estate the exemption is to be made, so that persons interested may know exactly what is exempt and what is not, and also a list of all his or her creditors and their postoffices, if known. If the debtor, in his schedule, conceals, or does not deliver up, for the benefit of his creditors, personal property subject to execution, he is not entitled to his exemption until he makes such delivery, and all orders of court obtained by concealment or fraud are void, and a debtor guilty of willful fraud forfeits his right of exemption. Upon the filing of the schedule the ordinary must give notice by publication in a gazette of the time when he will pass on the claim for exemption. The debtor must also give notice in writing to each of his creditors residing within the county. Any creditor may object, in writing, to the schedule for want of sufficiency and fullness, or for fraud of any kind, or may dispute the valuation of the personalty. Thereupon, if the objection is to valuation, the ordinary must appoint appraisers to examine and value the property. From the report of the appraisers and the other proceedings before him, the ordinary finally fixes the amount of exemptions to which the debtor is entitled, and approves the schedule

Digitized by Google

as thus settled by him, and gives it to the clerk of the superior court to be recorded. If the property sought to be exempted consists of cash, it must, by the direction of the ordinary, be invested in such articles of personalty as the applicant may desire, and, when so invested and returned by schedule, with or without other property, as the law may require, shall constitute the exemption of personal property, and in no case shall the allowance of cash without such investment be a valid exemption.[149] Provision is also made for the sale of exempt property and the reinvestment of the proceeds on petition to the judge of the superior court of the county wherein the debtor resides.[150] "An officer knowingly levying on or selling any property of the debtor exempt under this law, the schedule of which has been returned as required, is guilty of a trespass, and suit may be brought therefor in the name of the wife or family of the debtor, and the recovery shall be for their exclusive use." [151]

In Illinois, if a debtor against whom an execution issues desires to avail himself of the exemptions allowed to him, he must, within ten days after the service on him of a copy of the writ notifying him to do so, file a verified schedule of his personal property of every kind and character, including money on hand and debts due and owing, and deliver such schedule to the officer having the writ, or file it with the justice or in the court whence it issued. Appraisers must then be appointed to value the property described in the schedule, and, from the property so valued, the debtor may

[149] Code Georgia, ed. 1895, §§ 2828 to 2841; McNally v. Mulherin, 79 Ga. 614.

[150] Ib. § 2847.

[151] Ib. § 2872.

Digitized by Google

select the amount in value allowed to him by the exemption laws. Any property of the debtor not described in his schedule is subject to execution,[152] but the omission of articles from the schedule does not deprive the debtor of his right to the exemption of articles properly claimed.[153]

In Indiana, the claimant must furnish the officer with an inventory of his property, verified by oath,[154] and demand that the amount exempt be set off to him.[155] In making the affidavit and schedule a substantial compliance with the statute is sufficient.[156] The claim may be made and the schedule furnished at any time before the property is sold,[157] and, when made, the officer has no right to disregard it or to dispute its truth, but must require an appraisement before he proceeds.[158] In the absence of the defendant from the state or his home, his wife may make the schedule, and claim and receive the exemption, and exercise all the rights which would belong to her husband were he present.[159] If successive writs of execution issue, the claim must be interposed against each.[160] If the question of exemption arises incidentally, and not by urging it against an officer with a

[152] Starr & Curtis St. Ill., 2d ed., p. 1889, ch. 52, § 14; Finlin v. Howard, 126 Ill. 26; Boggess v. Pennell, 46 Ill. App. 150.

[153] Griffin v. Maxwell, 23 Ill. App. 405; Horton v. Smith, 46 Ill. App. 241.

[154] Mark v. State, 15 Ind. 99.

[155] Graham v. Crockett, 18 Ind. 119; Burn's St. Ind., ed. 1894, sec. 726; Boesker v. Pickett, 81 Ind. 554.

[156] Gregory v. Latchem, 53 Ind. 449; Astley v. Cameron, 89 Ind. 167.

[157] Eltzroth v. Webster, 15 Ind. 21, 77 Am. Dec. 78; State v. Read, 94 Ind. 103; Robinson v. Hughes, 117 Ind. 293, 10 Am. St. Rep. 45.

[158] Douch v. Rahner, 61 Ind. 64; Over v. Shannon, 91 Ind. 91.

[159] Burn's St. Ind., ed. 1894, § 727; Astley v. Capron, 89 Ind. 167.

[160] Finley v. Sly, 44 Ind. 266.

Digitized by Google

writ, as where it is sought to offset a judgment for exempt property, or to otherwise apply it in payment of the judgment creditor's debts, he may urge a claim to exemption by any appropriate pleadings, and support it by any competent evidence without first making the schedule and procuring an appraisement of his property.[161]

In Kentucky, no particular form of claiming exemption is prescribed by statute. If the right is dependent upon any fact of which the officer has no knowledge, it is the duty of the defendant to notify him thereof and to make the claim of exemption before the sale,[162] and where the debtor has property which is exempt up to a specified value, the officer must select disinterested householders to value it and set apart to the defendant such as may be selected by him or his agent within the value specified by the statute.[163]

In Michigan, an officer levying upon property, part of which is exempt, must have an inventory and appraisement of the whole made, and then allow the debtor to select which he will retain;[164] but the defendant is not entitled to have the inventory and appraisement embrace property situate out of the county in which the levy is made.[165] A claim made to an officer, and not allowed by him, may be allowed by his successor in office.[166] By the setting off of property to a debtor as exempt, it is released from the execution lien.[167] It will be seen that, by the statutes of this

161 Coppage v. Gregg, 1 Ind. App. 112.
162 Commonwealth v. Burnett (Ky.), 44 S. W. 966.
163 Barbour & Carroll's St. Ky., ed. 1894, § 1699.
164 Howell's Ann. Stats. Mich., §§ 7687, 7688; Elliott v. Whitmore, 5 Mich. 532; Wyckoff v. Wyllis, 8 Mich. 48.
165 Alvord v. Lent, 23 Mich. 369.
166 Selbert v. Kreibel, 5 Leg. Gaz. 189.
167 Hall v. Hough, 24 Ind. 273.

Digitized by Google

state, there is not imposed on the defendant the burden of making any claim or schedule, but the officer levying upon any class or species of property which is exempt from execution to a specified amount or value must himself make an inventory and procure an appraisement, and then permit the debtor to make his selection.[168]

A judgment debtor, by the statutes of Nebraska, desiring to avail himself of the exemption laws, must, at any time before the sale, file a verified inventory in the court where the judgment was obtained, or with the officer holding the execution, of the personal property owned by such debtor or in which he has any interest. Thereupon the officer must call to his assistance three disinterested freeholders of the county where the property may be situate, who must appraise it at its cash value. Upon the completion of the inventory and appraisement, the debtor or his agent may select the amount of exemptions to which he was entitled, but if the debtor or his agent does not make such selection, the officer must act for him in making it.[169] The inventory is liberally construed, and not rejected for mere informalities,[170] and an officer proceeding without an appraisement, or with an appraisement made by two instead of three appraisers, is liable to the debtor for the property sold.[171]

In North Carolina, the debtor is not required to make any inventory or schedule of his property, but,

[168] Howell's St. Mich., §§ 7687, 7688; Hutchinson v. Whitmore, 90 Mich. 255, 30 Am. St. Rep. 431; Jones v. Peek, 101 Mich. 389.

[169] Comp. St. Neb., ed. 1893, § 522, p. 926; State v. Wilson, 31 Neb. 462; Cunningham v. Conway, 25 Neb. 615; Kreisel v. Eddy, 37 Neb. 63; Quigley v. McEvony, 41 Neb. 73.

[170] Farquhar v. Hibben, 38 Neb. 556.

[171] Bender v. Bame, 40 Neb. 521; Johnson v. Bartek, 54 Neb. 787.

Digitized by Google

on his demand, appraisers must be appointed to make an appraisement of the property claimed as exempt, and he is permitted to select of the property appraised up to the amount of his exemption.[172] He must, however, remain entitled to his exemption up to the moment of the sale, and, though he was entitled thereto when the writ was levied, yet if, for some cause, his right has terminated at any time before that fixed for the sale, it may lawfully take place.[173]

In North Dakota and South Dakota, debtors are entitled to certain absolute exemptions, and, besides this, to personal property of a specified value. A debtor, to obtain this latter exemption, must make a verified schedule of his personal property and deliver it to the officer holding the writ. Appraisers are then selected by the debtor and the officer, to appraise the property, and the debtor may select the amount which he is entitled to retain, valued according to this appraisement. The officer is required, within three days after making any levy on personalty, to give notice thereof to the debtor, or his agent, or wife, or some other person authorized by law to represent him, and the defendant must, within three days thereafter, demand the benefit of his exemptions.[174]

In Pennsylvania, no particular form of claim is required.[175] Thus, in deciding whether a claim made by one Holben was in due form, the court of the last-named state said: "The testimony was, that Holben

[172] Code N. C., § 507; Allen v. Strickland, 100 N. C. 225; McAuley v. Morris, 101 N. C. 369.

[173] Jones v. Alsbrook, 115 N. C. 46.

[174] Comp. Laws Dakota, ed. 1887, §§ 5128, 5130 to 5135; Wagner v. Olson, 3 N. D. 69; Paddock v. Balgord, 2 S. D. 100; Swenson v. Christoferson, 10 S. D. 188, 66 Am. St. Rep. 712.

[175] Pepper & Lewis' Digest, p. 1923, § 18.

Digitized by Google

'warned the defendant not to sell—that he claimed this under the three-hundred-dollar law—that he claimed it for his family.' The court held this a sufficient demand. We think it was. The statute does not prescribe the form of the demand; and it would be very adverse to the spirit of the statute to hold a debtor to any technical accuracy in stating his demand. A demand or notice there must be; but any words which are sufficient to apprise the officer that the statutory exemption is the thing claimed is sufficient."[176] If several writs are in the officer's hands at the same time, one demand is sufficient as against all.[177] But a demand against one writ does not operate against subsequent writs.[178] The fact that an appraisement has been demanded, and a setoff made in pursuance thereof, does not prevent a levy on the same property under a subsequent writ, unless the benefit of appraisement is demanded against that writ also.[179] An appraisement may be vacated by the court, if manifestly too low,[180] or if not publicly conducted.[181]

§ 214. Waiver of Exemption Rights.—That the exemption law may be waived in the absence of a statute clearly forbidding such waiver is, we think, not doubted.[182] As against the defendant in execution, it cannot be waived except by himself or his agent

[176] Diehl v. Holben, 39 Pa. St. 216; Keller v. Bricker, 64 Pa. St. 379.

[177] Bechtel's Appeal, 2 Grant Cas. 375.

[178] McAfoose's Appeal, 32 Pa. St. 276; Dodson's Appeal, 25 Pa. St. 232; Line's Appeal, 2 Grant Cas. 197.

[179] Finley v. Sly, 44 Ind. 266.

[180] Sleeper v. Nicholson, 1 Phila. 348; Fisher v. Hughes, 9 Pittsb. L. J. 50.

[181] Huddy v. Sproule, 18 Leg. Int. 141.

[182] Marchildon v. O'Hara, 52 Mo. App. 523.

Digitized by Google

directly authorized to make such waiver. There is some reason for denying him the right to make a waiver when he is the head of a family dependent on him for support, and the loss of the exemption may lead to their suffering more than to his. Especially is this true when, because the exemption is one allowed only to heads of families, the statute may fairly be construed as seeking the benefit of the family, and, hence, as giving a right which ought not to be relinquished except by the consent of all, or, at least, of all the adult members. There are states in which statutes have been enacted denying to husbands the power to waive the benefit of exemptions without the concurrence of their wives.[183] In the absence of statutes to the contrary, however, the husband and father must be regarded as entitled to represent the whole family, and, therefore, may waive the benefit of the exemption laws without the consent of the wife or any other member of the family.[184] In Alabama, the waiver of the claim of exemption must be in writing, and, when it relates to real property, must be executed by both the husband and wife.[185] Elsewhere, the waiver need not be written, nor need it be expressed in words. It is generally inferable from permitting the property to be levied upon and sold without objection and without indicating any desire to have the benefit of the exemption laws.[186]

In some instances, the claim for exemption may be disallowed, because of some prior act or neglect of the

[183] Hess v. Beates, 78 Pa. St. 429.

[184] Charpentier v. Bresnahan, 62 Mich. 360; Betz v. Brenner, 106 Mich. 87.

[185] Const. Ala., art. 10, § 7.

[186] Chambers v. Perry, 47 Ark. 400; Stanton v. French, 83 Cal. 194.

Digitized by Google

claimant. The consideration of this topic is necessarily involved in the two preceding sections. The claim must be made in the manner and within the time required by the law of the state as expressed in its statutes or in the decisions of its courts. In Iowa, as we have seen, the rule formerly prevailed that the voluntary surrender of the property to the levying officer, without then interposing any claim or objection, was an irrevocable waiver of his claim.[187] If such surrender was made by the debtor with a knowledge of his rights, and was accompanied by such words or acts as indicated his intention to renounce the benefit of the law, it would probably afford sufficient reason for holding him estopped from subsequently pressing his claim,[188] especially if it appeared that the judgment creditor had incurred serious expense in keeping the property, or in advertising or preparing it for sale, or had been otherwise substantially damnified by the debtor's conduct. But it has been held that the license to take exempt property could be revoked, and that property reclaimed at any time prior to the sale.[189] At all events, it seems that the rule to be gathered from the majority of the reported cases on the subject is, that the mere surrender of property to an officer, or the execution of a bond for its surrender to him, does not estop the debtor from subsequently claiming such of the property as may be exempt.[190] Certainly, no irrevocable waiver is implied by any language or course

[187] Richards v. Haines, 30 Iowa, 574.

[188] Fogg v. Littlefield, 68 Me. 52.

[189] Jordan v. Autrey, 10 Ala. 276; Wallis v. Truesdell, 6 Pick. 455.

[190] Eltzroth v. Webster, 15 Ind. 21, 77 Am. Dec. 78; Perry v. Hensley, 14 B. Mon. 474, 61 Am. Dec. 164; Jordan v. Autrey, 10 Ala. 276.

Digitized by Google

of conduct which is not clearly inconsistent with an intention to claim the exemption at some time prior to the sale.[191] In other words, the debtor may ordinarily postpone, until the sale, the determination of the question whether and to what extent he will claim his exemption. Nor can the debtor's rights be prejudiced by the execution of a delivery bond under protest.[192] Nor is a protest essential. The giving of a delivery bond seems not to estop the defendant from claiming his exemption at any time prior to the sale.[193] The delivery of property by a garnishee to an officer to be sold is no waiver of exemption, for the obvious reason that the garnishee, from his want of interest in the property, has no authority to waive anything.[194] If the defendant claims his exemption, and does all the law exacts of him to prevent a sale, there is no ground to impute a waiver to him. Being satisfied that the officer will persist in the sale, he may become the latter's bailee until the sale, and may then bid in the property himself, or procure others to do so, without impairing his right to proceed against the officer by any appropriate action to recover the value of the goods sold, or damages resulting from their seizure and sale.[195] An agreement by a debtor to turn certain exempt property over to his creditors to secure the payment of their debt, or over to a third person to sell for

[191] Harrington v. Smith, 14 Colo. 376, 20 Am. St. Rep. 272; Rice v. Nolan, 33 Kan. 28; Gardner v. King, 37 Kan. 671; Frey v. Butler, 52 Kan. 722; Dennis v. Benfer, 54 Kan. 527; Gray v. Putnam, 51 S. C. 97; House v. Phelan, 83 Tex. 595.

[192] Atkinson v. Gatcher, 23 Ark. 101; Servanti v. Lusk, 43 Cal. 238.

[193] Desmond v. State, 15 Neb. 438; Daniels v. Hamilton, 52 Ala. 105.

[194] Fanning v. Nat. Bank, 76 Ill. 53.

[195] Parham v. McMurry, 32 Ark. 261; Phillips v. Taber, 83 Ga. 565.

Digitized by Google

the benefit of creditors, does not justify them in levying an execution thereon, nor preclude him from claiming his exemption rights if they do; for his agreement does not contemplate the forced sale of the property under execution.[196] Elsewhere it has been held that if exempt property is pledged for the payment of a debt, and judgment is recovered for such debt, and execution issued thereon, it may be levied upon such exempt property, because the pledging of it is a waiver of the right of exemption to the extent of the debt for which the pledge is made.[197] Whenever, by the act or consent of the owner of exempt property, a lien is created thereon, there is an implied waiver of the exemption to the extent of such lien, as where exempt property is delivered to another person to perform labor thereon, and the law gives him a lien to secure his compensation for such labor.[198]

§ 214 a. Forfeiture of Exemption Rights.—Though the debtor has done nothing indicating any willingness to waive his exemption rights, it may be insisted that he has in some manner forfeited such rights. There are statutes in several of the states directly authorizing a denial to the defendant of his exemption rights if he has been guilty of any fraud or concealment. If there is no constitutional limitation upon the subject, the legislature, as it may fail to provide for any exemption rights whatsoever, may undoubtedly provide for their forfeiture for any cause which to it may seem proper. Some of the state constitutions have, how-

[196] Washburn v. Goodheart, 88 Ill. 229; Haswell v. Parsons, 15 Cal. 266, 76 Am. Dec. 480.

[197] Hawley v. Hampton, 160 Pa. St. 18.

[198] Rogers v. Raynor, 102 Mich. 473.

Digitized by Google

ever, guaranteed to debtors certain exemptions therein designated. It has been held that these constitutional provisions do not inhibit the enactment of statutes forfeiting the debtor's exemption rights for fraudulent conduct on his part, as by concealing his property or entering into schemes for the purpose of otherwise defrauding his creditors.[199]

If exempt goods be so mixed with others that they can no longer be identified, the right of exemption is lost. The claimant must always be able to point out the property claimed.[200] The exempt and nonexempt property having been inextricably blended, the exemption must necessarily be denied as to the whole. Else the creditor is compelled to suffer and the debtor permitted to profit by the act or neglect of the latter. The fact that the debtor has mortgaged,[201] or is about to sell,[202] property, is no waiver or forfeiture of his right to claim its exemption from execution. But the cases in which a forfeiture of exemption rights is claimed with the greatest plausibility are those in which he has been guilty of some act of bad faith toward his creditors. In Pennsylvania, a debtor who conceals his property, or otherwise attempts to delay or prevent the execution of the writ, forfeits the benefit

[199] McNally v. Mulherin, 79 Ga. 614.

[200] Smith v. Turnley, 44 Ga. 243; Roth v. Wells, 29 N. Y. 471.

[201] Collett v. Jones, 2 B. Mon. 19, 36 Am. Dec. 586; Vaughan v. Thompson, 17 Ill. 78; Hill v. Johnson, 29 Pa. St. 362; Patten v. Smith, 4 Conn. 450, 10 Am. Dec. 166; Cheney v. Caldwell, 20 Mont. 77; Ladwig v. Williams, 87 Wis. 615.

[202] Shaw v. Davis, 55 Barb. 389; Duvall v. Rollins, 68 N. C. 220. In the last-named case the debtor sold the property, but the vendee rescinded the sale. Where a debtor, having two yokes of oxen, sold one yoke conditionally, the other was held exempt. Wilkinson v. Wait, 44 Vt. 508, 8 Am. Rep. 391. But sending goods to auction-room was held to be a waiver of exemption rights in Kennedy v. Haselton, 4 Chand. 19.

Digitized by Google

of the exemption law.[203] This rule does not seem to have its foundation in any provision of the statutes of that state. It resulted from the belief of the judges that these statutes were designed for the exclusive benefit of honest debtors—for those only who would not seek to avoid the operation of the writs directed against them. If, however, we concede that the dishonest are not worthy of the benefits of the exemption laws, it still seems that we should not, as judges, enforce our peculiar ideas until they had met the expressed approval of the legislature. Judges ought not to pronounce sentence where the law has provided no penalty. Besides, it must be remembered that one of the chief objects of these laws is to protect and provide for the debtor's family, and that this object would be partially subverted by making the benefit of the law depend upon the character of the debtor. Hence, the position taken by the courts of Pennsylvania has been vigorously, and, we think, successfully, assailed, as will appear from the following quotation, extracted from an opinion of the highest court in Mississippi: "This exemption is granted without any reference to the merit or demerit of the debtor. It is founded upon a policy that has no relation to the character or conduct of the parties claiming the benefit of it. It is to the interest of the state that no citizen should be stripped of the implements necessary to enable him to carry on his usual employment, and that families should not be made paupers or beggars, or deprived of shelter and reasonable comforts, in consequence of the

[203] Strouse v. Becker, 38 Pa. St. 190, 80 Am. Dec. 474; Carl v. Smith, 28 Leg. Int. 366; Emerson v. Smith, 51 Pa. St. 90, 88 Am. Dec. 566. See Brackett v. Watkins, 21 Wend. 68; Imhoff's Appeal, 119 Pa. St. 350; Riley v. Ogden, 185 Pa. St. 506.

Digitized by Google

follies, the vices, or the crimes of their head. The right to enjoy the benefit of the exemption does not in any manner depend upon the question whether the party is solvent or insolvent; whether he possesses other slaves or other property, or not; or whether he has or has not made a fraudulent disposition of other property, with intent to hinder and delay his creditors. The statute makes no such exceptions, and it is not for the court to ingraft them upon it." [204]

In Missouri, a suit for levying upon exempt property was resisted, on the ground that, at the time of the levy, the debtor had other property, which he concealed, to avoid its being levied upon. The court said: "If the defendant in the execution, who claims the property to be exempt, has concealed, or hid, or placed beyond the immediate reach of the officers of justice his property, and this fact be known to the plaintiffs in execution, let them ferret out the hidden property and take steps to reach it, and subject it to the process of the law. The burden should be on their shoulders. They have no right to destroy the obvious intention of the statute in favor of the helpless and needy, when they can so easily reach the hidden or concealed property." [205] The debtor's claim for exemption cannot be successfully resisted on the ground that he has committed perjury in swearing to a false schedule,[206] or has made a fraudulent mortgage, and has property in another county which has not been levied upon,[207] or has other property which he fraudulently conceals for the pur-

[204] Moseley v. Anderson, 40 Miss. 49; Duvall v. Rollins, 71 N. C. 218.

[205] Megehe v. Draper, 21 Mo. 510, 64 Am. Dec. 245.

[206] Over v. Shannon, 91 Ind. 99.

[207] Baldwin v. Talbot, 43 Mich. 11.

Digitized by Google

pose of hindering, delaying, and defrauding his creditors.[208]

Nor does an attempt by the debtor to prevent a levy by disclaiming all interest in the property and falsely representing it to belong to a third person forfeit, or estop him from enforcing, his exemption rights.[209] The reason for this rule has been thus stated: "The conduct and statements of a party never operate as an estoppel in favor of another party where the latter is not influenced thereby in his subsequent action, and to his prejudice. The fact that respondent disclaimed any ownership of the property in himself, at the time of the levy, had no influence whatever on the officer who made it, for he made it notwithstanding the disclaimer, and afterward sold the property. The failure of respondent to interpose his claim of exemption as to such property at the time of the levy could not work an estoppel against his making the claim subsequently, for it is neither found nor shown that the officer did, or omitted to do, anything by reason of such act or omission of respondent, or that plaintiff in the execution was in any way prejudiced thereby." [210]

The denial of exemption rights to a debtor on the ground of his fraud or other misconduct must rest upon the ground either that such denial may be justified as a punishment, or on the ground that the debtor has, by his assertion or conduct, estopped himself from claiming the property to be exempt. Punishment the

[208] Elder v. Williams, 16 Nev. 416; Pinkus v. Bamberger, 99 Ala. 266; Cowan v. Phillips, 122 N. C. 70; Comstock v. Bechtel, 63 Wis. 656.

[209] Wallis v. Truesdell, 6 Pick. 455; Farrell v. Higley, Hill & D. 87.

[210] McAbe v. Thompson, 27 Minn. 134; contra, Miles v. State, 73 Md. 98.

Digitized by Google

courts are not ordinarily authorized to inflict, except for an act designated as a crime either by the statute or the common law, and upon a conviction thereof after an accusation and trial in the mode pointed out by the laws governing the criminal procedure. Hence, we do not understand how the withholding of exemption as a punishment can be justified in the absence of a statute expressly authorizing it. The law of estoppel is, however, applicable, and, through its operation, the defendant may, in effect, forfeit his exemption rights in a proper case. He is not, however, estopped solely by being guilty of a fraud, or committing perjury, or denying his ownership of the property, or the doing of any other act, however criminal or however inconsistent with his claim.[211] It must, therefore, appear that, because of his fraud, perjury, or false representation, the party urging the estoppel has been induced to act and to place himself in a position wherein he would not otherwise have placed himself, and where it would be inequitable for the defendant to deny his former representations or to disprove his former assertions, whether under oath or not. If a debtor conveys his property to delay or defraud creditors, he cannot sustain an action for it as exempt, because he has parted with the title, and cannot urge his own fraudulent design for the purpose of defeating his deed.[212] If, however, the conveyance should be vacated for fraud, the exemption rights would revive.

We have heretofore shown that, in some of the states, a debtor wishing his exemptions must make a sched-

[211] Boylston v. Rankin, 114 Ala. 408, 62 Am. St. Rep. 111; Sannoner v. King, 49 Ark. 299, 4 Am. St. Rep. 49; State v. Carson, 27 Neb. 501, 20 Am. St. Rep. 681.

[212] Mandlove v. Burton, 1 Cart. 39.

Digitized by Google

ule or inventory, either of his whole property or that which he selects and claims as exempt. Under these statutes he may forfeit or waive his claim of exemption either by wholly failing to make any schedule or inventory, or by making a schedule purporting to describe his exempt property and omitting some therefrom. In the one case the officer is justified in selling all the property, because no schedule has been made or filed, and, in the other, in selling that part to which no claim of exemption has been interposed.[213] Where the course of practice in attachment proceedings is, after the levy of an attachment, to enter a judgment and order directing the sale of the property attached, but the debtor has until the sale to claim or select his exemptions, such judgment and order do not constitute an adjudication against him that the property was subject to attachment or not exempt from execution. Hence, his exemption rights remain unaffected, and he may still enforce them.[214]

§ 215. Consequences of Officers Disregarding Claim for Exemption.—The claim for exemption, when made in due form and in due time, may be disregarded by the officer, who may proceed to sell the property as if such claim had not been made. When he does so, the question arises, What are the consequences with respect to the claimant, the officer, and the purchaser at the execution sale? The consequence to the claimant is, that he must vindicate his rights by some ap-

[213] Weller v. Moore, 50 Ark. 253; Griffin v. Maxwell, 23 Ill. App. 405; McVeagh v. Bailey, 29 Ill. App. 606; Finlen v. Howard, 126 Ill. 259; Moss v. Jenkins, 146 Ind. 589; Brown v. Edmonds, 5 S. D. 508.

[214] Hamilton v. Fleming, 26 Neb. 240; State v. Carson, 27 Neb. 501, 20 Am. St. Rep. 681.

Digitized by Google

propriate form of action, either common law or statutory. We have the authority of one case to the effect that he may resist the threatened invasion of his rights to the extent of opposing the officer by force.[215] This case is in harmony with a decision in Michigan. The statute in that state provides for the prosecution and punishment of any person obstructing, resisting, or opposing any sheriff or other officer, duly authorized, in serving, or attempting to serve or execute, any process. As a defense to a prosecution under this statute, it was shown that the resistance of which the defendant was guilty, was against a levy by an officer upon property exempt from attachment, and the trial judge was asked to instruct the jury that the defendant was justified in using force sufficient to prevent the unlawful levy. This instruction was refused, and the defendant convicted. The appellate court determined that the instruction should have been given, if it was shown that the property was exempt, saying: "No writ in this state authorizes the sheriff to levy upon such property, and, when he does it, it is at his own peril. The law will not protect him in doing that which it has expressly commanded him not to do. Neither is the debtor compelled to submit to such trespass, without reasonable resistance. If the doctrine contended for by the prosecution and laid down in the charge were to obtain, every poor debtor would be at the mercy of the sheriff and constabulary of the county, and the statutory benefits intended by the exemption would be of little avail."[216] We apprehend that this is a mistaken view. Its maintenance would make each claimant the judge

[215] State v. Johnson, 12 Ala. 840, 46 Am. Dec. 283.
[216] People v. Clements, 68 Mich. 655, 13 Am. St. Rep. 373.

Digitized by Google

of the merits of his own claim, and would lead to violence, and even to the loss of life. If this sort of warfare is lawful, we should expect the history of each county to consist largely of the annals of petty battles between the debtor and his friends on the one side, and the officer, with the creditor and his friends, on the other, and which of the contestants should be deemed riotous criminals, and which applauded as brave defenders of the law, would depend upon the ultimate determination of those numerous issues of law and fact which attend all litigation regarding exemption rights. The consequences to the officer do not, in our judgment, include the right of the claimant to challenge him to physical combat. But he must submit to legal combat of great variety and seriousness, as we shall show in the next section; and the creditor may generally be joined with him, and compelled to share in the results. When the sale has taken place, the vital question to the purchaser is whether, notwithstanding the sale of the exempt property under execution, the claimant may disregard the sale and recover the property from the purchaser. As to property exempt under the homestead laws, it is perfectly clear that an execution sale against the objections, and in defiance of the rights, of the claimant conveys no title whatever;[217] and it seems to be equally well settled that this rule is applicable to other exempt property.[218]

[217] Morris v. Ward, 5 Kan. 239; Wing v. Hayden, 10 Bush, 276; Beecher v. Baldy, 7 Mich. 488; Vogler v. Montgomery, 54 Mo. 577; Wiggins v. Chance, 54 Ill. 175; Hamblin v. Warnecke, 31 Tex. 91; Abbott v. Cromartie, 72 N. C. 292, 21 Am. Rep. 457; Kendall v. Clark, 10 Cal. 17, 70 Am. Dec. 691; Myers v. Ford, 22 Wis. 139; post, § 239.

[218] Paxton v. Freeman, 6 J. J. Marsh. 234, 22 Am. Dec. 74; Johnson v. Babcock, 8 Allen, 583; Williams v. Miller, 16 Conn. 144;

Digitized by Google

§ 215 a. Actions Brought when the Debtor's Claim for Exemption is Denied are either for the recovery of the specific property claimed, or for damages for its conversion or detention. Property seized by an officer, acting under a writ from a court of competent jurisdiction, is certainly thereby placed in the custody of the law, if his act can be justified by the terms of the writ. Though commanded to seize the property of the defendant, he may take that of a stranger to the writ, and though directed to levy upon that which is subject to execution, he may, in defiance of the debtor's protestations, seize that which is exempt. In either case the question arises, Has an act forbidden by law placed the property in the custody of the law? If it has, then it is certain that the property cannot be reclaimed by an independent action, and replevin therefor does not lie. So far as exempt property is involved, the question has received a statutory answer in many of the states, by the terms of which an affidavit is exacted from the plaintiff, to the effect that the property has not been "seized under an execution or an attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure."[219] If exempt property is seized, it may, under these statutes, be recovered by re-

Twinam v. Swart, 4 Lans. 263; Coville v. Bentley, 76 Mich. 248. 15 Am. St. Rep. 312.

[219] Code Civ. Proc. Cal., § 510; Stats. Mich., ed. 1882, § 8321; Giauque's Rev. Stats. of Ohio, § 5815; Milliken and Ventree's Code of Tenn., § 4112; Stover's N. Y. Code Civ. Proc., ed. 1894, § 1695; Ind. Gen. Stats., 1894, § 1287; Webb's Kan. Gen. Stats., ch. 95, § 177; Code Civ. Proc. S. C. ed. 1893, § 228; Sanborn and Berryman's Stats. Wis., § 2718; Rev. Stats. Fla., 1891, § 1712; Starr and Curtis' Ill. Stats., ed. 1896, ch. 119, § 4; Code of Iowa, 1897, § 4163; Carroll's Ky. Codes, § 181; Stats. Minn. 1894, § 5275; Rev. Codes N. D., 1895, § 5332; Hill's Annotated Laws Or., ed. 1892, p. 261; Ballinger's Codes and Stats. Wash., sec. 5419; Rev. Stats. Wyo., 1887, § 3021.

Digitized by Google

plevin.[220] That, in many instances, there can be no other adequate remedy is beyond doubt. Cheap, worn, and even dilapidated articles of wearing apparel, and of household furniture, are to the debtor and his family of value wellnigh inestimable, while the amount which he can be awarded for their conversion will rarely more than repay the expenses of the litigation. Nevertheless, if the law be that these chattels cannot be recovered in specie of the officer, it must be tolerated and respected until modified by appropriate legislation. That such was the law in the absence of such legislation was affirmed by the earlier American decisions.[221] Most of the later cases take an opposite view, though the courts were acting under the common law, or under statutes which merely sanctioned the action of replevin, when goods were unlawfully detained.[222]

The action of trover seems to have been very rarely resorted to against officers for wrongfully taking and selling exempt chattels.[223] It certainly is an appropriate form of action, for, by disregarding the claim of exemption, the officer is guilty of "a conversion, respecting which he may be regarded as a tortfeasor

[220] Hilton v. Osgood, 49 Conn. 110; Allen v. Ingram, 39 Fla. 239; Wilson v. Stripe, 4 G. Greene, 551; Douch v. Rahmer, 61 Ind. 64; Maxon v. Perrott, 17 Mich. 332, 97 Am. Dec. 191; Elliott v. Whitmore, 5 Mich. 532; Linander v. Longstaff, 7 S. D. 157; Samuel v. Agnew, 80 Ill. 556; Cooley v. Davis, 34 Iowa, 128; Chapin v. Hoel, 11 Ill. App. 309; Carlson v. Small, 32 Minn. 492.

[221] Kellogg v. Churchill, 2 N. H. 412, 9 Am. Dec. 104; Gist v. Cole, 2 Nott & McC. 456, 10 Am. Dec. 616; Spring v. Bourland, 11 Ark. 658, 54 Am. Dec. 243; Buis v. Cooper, 63 Mo. App. 196.

[222] Mosely v. Anderson, 40 Miss. 49; Ross v. Hawthorne, 55 Miss. 551; Frazier v. Syas, 10 Neb. 115, 35 Am. Rep. 466; Wilson v. McQueen, 1 Head, 17; Harris v. Austell, 2 Baxt. 148.

[223] McCoy v. Dail, 6 Baxt. 137; Wolfenbarger v. Standifer, 3 Sneed, 661.

Digitized by Google

from the beginning."[224] And, though the exemption is for the benefit of the wife and children, as well as of the debtor, he may, without joining either, maintain an action of trover for the conversion by an officer of the exempt property.[225] There is little doubt that, except in Vermont,[226] a person denied his exemption rights may successfully prosecute an action on the case for the injury done him.[227]

The one question, however, upon which all the authorities agree is, that the abuse of process of which an officer is guilty when he denies the debtor's exemption rights makes him a trespasser ab initio, and that the debtor may properly seek redress in an action of trespass;[228] but it is said that the officer is not liable in this form of action, if there was any serious doubt whether the property was exempt,[229] nor if the benefit of exemption or selection was not claimed.[230] In a state like Pennsylvania, where no specific property is exempt, and where on demand it is the duty of the officer to allow an exemption of a specified value,

[224] McCoy v. Brennan, 61 Mich. 362, 1 Am. St. Rep. 589.

[225] Braswell v. McDaniel, 74 Ga. 319.

[226] Dow v. Smith, 7 Vt. 465, 29 Am. Dec. 202.

[227] Van Dresor v. King, 34 Pa. St. 201, 75 Am. Dec. 643; Spencer v. Brighton, 49 Me. 326; Perry v. Lewis, 49 Miss. 443.

[228] Bean v. Hubbard, 4 Cush. 85; Dow v. Smith, 7 Vt. 465, 29 Am. Dec. 202; Leavitt v. Metcalf, 2 Vt. 342, 19 Am. Dec. 718; Bonnel v. Dunn, 28 N. J. L. 153; Cornelia v. Ellis, 11 Ill. 585; Wymond v. Amsbury, 2 Colo. 213; Stephens v. Lawson, 7 Blackf. 275; Atkinson v. Gatcher, 23 Ark. 101; Hall v. Penney, 11 Wend. 44, 25 Am. Dec. 601; State v. Johnson, 12 Ala. 840, 46 Am. Dec. 283; Freeman v. Smith, 30 Pa. St. 264; Wilson v. Ellis, 28 Pa. St. 238; Van Dresor v. King, 34 Pa. St. 201, 75 Am. Dec. 643; State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; State v. Farmer, 21 Mo. 160.

[229] Trovillo v. Shingles, 10 Watts, 438.

[230] State v. Morgan, 3 Ired. 186, 38 Am. Dec. 714; Frost v. Shaw, 3 Ohio St. 270.

Digitized by Google

the sole remedy of the claimant is against the officer for damages.[231]

The remedy of the judgment debtor, for subjecting his property to execution in defiance of the exemption laws, is not restricted to an action against the officer who may have levied and denied the right of exemption. It extends to all persons who actively participate in the wrong. The plaintiff in the writ is not liable to any action, so long as he remains passive, and, hence, may defeat any action brought against him, because of the levy and sale, though he knew of the claim of exemption, provided he did not direct the officer what to do, nor instruct him to disregard the claim for exemption.[232] It is otherwise, when he assumes control, or directs the levy actually made, or otherwise becomes an active instrument in interference with, or denial of, the right of exemption.[233] It is not material what is the mode of procedure adopted by the plaintiff to subject to execution property which the law has declared to be exempt, though the form of action must necessarily be adapted to the injury involved. Thus, where there is no levy upon property, capable of manual possession, an action for its possession or conversion cannot be maintained, but the defendant is not, hence, without redress, if an injury has been suffered by him. He may be entitled to his personal earnings, or to enforce choses in action

[231] Marks' Appeal, 34 Pa. St. 36, 75 Am. Dec. 631; Hatch v. Bartle, 45 Pa. St. 166, 84 Am. Dec. 484; Hammer v. Freese, 19 Pa. St. 255; Bonsall v. Comly, 44 Pa. St. 442.

[232] Russel v. Walker, 150 Mass. 531, 15 Am. St. Rep. 239; White v. Stribling, 71 Tex. 108, 10 Am. St. Rep. 732.

[233] Elder v. Frevert, 5 West Coast Rep. 52; Spencer v. Brighton, 49 Ark. 326; Atkinson v. Gatcher, 23 Ark. 101; Frazier v. Syas, 10 Neb. 115, 35 Am. Rep. 466.

Digitized by Google

which have been declared exempt, and the creditor may, by garnishment or other proceedings, obtain satisfaction, directly or indirectly, out of such earnings or choses. In so doing, he abuses legal process, and his debtor may maintain any appropriate action to recover compensation for the injuries suffered therefrom.[234]

The sureties on the official bond of the officer are also answerable for his trespass in seizing and selling exempt property.[235] In all actions against officers, it is of course necessary to aver and prove all the facts entitling the party to the exemption, and showing that the officer has knowingly disregarded the claimant's rights.[236] The burden of proof is upon the debtor to show that he belongs to the class of persons who by the statute are entitled to exemption, and that the chattels for the taking of which he sues are such as were exempt. In other words, he is not aided by any presumption, and must offer evidence tending to prove every fact, essential to his recovery.[237] In some of the states an officer who refuses to allow a defendant his exemption rights is liable to criminal prosecution, which, if sustained, will result in his being convicted and punished as for a misdemeanor.[238] In others, defendant may, at his election, sue for and recover a penalty, or additional damages allowed him by stat-

[234] Nix v. Goodhill, 95 Ia. 282, 58 Am. St. Rep. 434; Stark v. Bare, 39 Kan. 100, 7 Am. St. Rep. 537.

[235] State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; State v. Carroll, 9 Mo. App. 275; State v. Kenan, 94 N. C. 296; Commonwealth v. Stockton, 5 T. B. Mon. 192; Kreisel v. Eddy, 37 Neb. 63.

[236] Wolfenbarger v. Standifer, 3 Sneed, 659; Pollard v. Thomason, 5 Humph. 56; Figueira v. Pyatt, 88 Ill. 402.

[237] Alabama Conference v. Vaughan, 54 Ala. 443; McMasters v. Alsop, 85 Ill. 157; Brown v. Davis, 9 Hun, 43; Calhoun v. Knight, 10 Cal. 393.

[238] State v. Carr, 71 N. C. 106; State v. Haggard, 1 Humph. 300, 34 Am. Dec. 650.

Digitized by Google

ute, greatly in excess of the value of the property wrongfully taken.[239] If, at the time of the sale of exempt property under execution, the debtor has done nothing to waive or forfeit his right of his exemption, the title to the property does not pass to the purchaser, whether he be the plaintiff in execution or some other person. If the purchaser takes possession of the property, or does any other act in violation or defiance of the defendant's rights, the latter may maintain an action for possession of the property, or for its conversion, or any other action appropriate to the vindication of his rights.[240]

§ 215b. Measure of Damages and Right to Set-off.—When the action is in replevin, the plaintiff may, in addition to the property or its value, recover interest thereon from the time of the wrongful taking to the trial,[241] or, instead of interest, he may recover the value of the use of the property for the same period.[242] Where the action is in trespass or trover, the damages must ordinarily also be the current market value of the property, with interest. But the taking of exempt property may very properly give rise to a claim for exemplary damages. In Michigan it has been held that the jury are not at liberty, "after estimating the actual damages, to go further and give a further sum, limited only by their discretion, by way

[239] Wymond v. Amsbury, 2 Colo. 213; Amend v. Murphy, 69 Ill. 337.

[240] Stewart v. Welton, 32 Mich. 56; Hart v. Hyde, 5 Vt. 328.

[241] Twinam v. Swart, 4 Lans. 263; Spencer v. Brighton, 49 Me. 326.

[242] Elder v. Frevert, 18 Nev. 446; Allen v. Fox, 51 N. Y. 562, 10 Am. Rep. 641; Crabtree v. Clapham, 67 Me. 326; Robbin's Adm'r v. Walter, 2 Tex. 130; Darby v. Cassaway, 2 Har. & J. 413; Butler v. Mehrling, 15 Ill. 488.

Digitized by Google

of punishment and example." But the court further said: "In some cases the damages are incapable of pecuniary estimation; and the court performs its duty in submitting all the facts to the jury, and leaving them to estimate the plaintiff's damages, as best they may, under all the circumstances. In other cases, there may be a partial estimate of damages by a money standard, but the invasion of plaintiff's rights has been accompanied by circumstances of peculiar aggravation, which are calculated to vex and annoy the plaintiff, and cause him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. But in all cases it is to be distinctly borne in mind that compensation to the plaintiff is the purpose in view, and any instruction which is calculated to lead them to suppose that, besides compensating the plaintiff, they may punish the defendant is erroneous." [243] In Minnesota a jury were instructed that, if they should find that the defendants, knowing the property to be exempt, willfully and maliciously attached the same for the purpose of harassing and oppressing the plaintiff, then they would not be limited to the value of the property and interest thereon, but they might award such damages to the plaintiff as they should deem him entitled to under the circumstances. The instruction was approved. As against the objection that there was no evidence of such aggravating circumstances as justified the instruction, the court re-

[243] Stilson v. Gibbs, 53 Mich. 280.

Digitized by Google

plied that if the defendants knew the property to be exempt, that was "an aggravating circumstance of the strongest character"; that to such seizure "it is impossible to ascribe any other than a malicious motive. It was a gross outrage upon the rights of plaintiff, which the law does not tolerate, and justly allows damages by way of punishment and example."[244] The effect on a jury of the instruction approved in Minnesota, and an instruction such as that admitted to be proper in Michigan, would be substantially identical, for each would permit the embodiment in the verdict of damages other than pecuniary, to wit, the damages arising from the aggravating circumstances of having one's exempt chattels taken by one who knew them to be exempt.

In Alabama, "exemplary or vindictive damages, as they are indifferently termed, may also be recovered, if the trespass is committed with a bad motive, with an intent to harass or oppress or injure; and the fact that it is wantonly, recklessly, or knowingly committed, is a circumstance indicative of malice, and proper matter for the consideration of the jury." But in that state it is the duty of an officer to proceed to levy, if indemnified by the plaintiff in the writ, though he may know the property is not subject to execution. He, therefore, is not guilty of malice or oppression in proceeding to levy on exempt property, after being directed so to do by plaintiff and indemnified for proceeding; and it is immaterial that he believed or knew the property to be exempt. "If, after indemnity, he should proceed to a levy, or to execution of the process, rudely, insultingly, or in an aggravated manner,

[244] Lynd v. Picket, 7 Minn. 184, 82 Am. Dec. 79.

Digitized by Google

indicative of malice, or of an intent to harass or oppress or injure, he would be answerable for vindictive damages. A bad, malicious intent, in the commission of a trespass, is always proper matter for the consideration of a jury; for a man acting tortiously, with such an intent, ought, in justice, to be dealt with more harshly than a man who acts ignorantly, without such intent. But when a public officer is in the line of duty, acting in obedience to process, which he cannot with safety refuse to execute, whatever may be his information or knowledge of facts, which, if proved in the course of a judicial investigation, will subject him to liability as a trespasser, it would savor of harshness and oppression if his liability was increased by the addition of vindictive damages, because of such knowledge or information. Acting in good faith, under instructions and indemnity from the party controlling the process, who is in pursuit of his supposed legal rights, if there are no circumstances of aggravation, no facts indicative of a bad motive, nothing more than information that the property is not subject to the process, the value of the property taken, with interest to the time of the trial, is the only reparation he can be required to make; this is full compensation to the owner, and all he can in good conscience demand."[245] In some of the states, the exemption rights of debtors are protected by statutes allowing the damages to be trebled. Where such statutes are in force, the debtor has his election to sue for the penalty thus allowed him, or to proceed by an ordinary action of trespass.[246]

[245] Alley v. Daniel, 75 Ala. 408.

[246] Amend v. Murphy, 69 Ill. 337; Wymond v. Amsbury, 2 Colo. 213; Shear v. Reynolds, 90 Ill. 238.

Digitized by Google

If, in an action by a debtor to recover damages for violating his exemption rights, the plaintiff seeks to assert, as an offset, the judgment against the debtor, or any other debt, such offset must be denied. Otherwise, the exemption laws would be futile, for the creditor would always wrongfully take the exempt property, and then pay the damages by pleading his judgment, or some other debt, as an offset.[247] The same principle is applicable when, instead of suing for damages for selling, detaining, or converting exempt property, the plaintiff brings an action to recover moneys for his personal services or upon any chose in action, which, by the statute of the state, is exempt from execution. In such an action, no offset can be allowed, if the result of allowing it must be to permit the defendant in the suit to apply upon the demand due to him a chose in action due to the plaintiff, but exempt from execution.[248]

§ 216. Agreements to Waive the Benefit of the Exemption Laws have been the subjects of judicial discussion and decision in several of the states. By these agreements, debtors, at the time of incurring a liability, contract with their creditors that they will not, as against any execution, issued to enforce a discharge of the liability, claim anything as exempt. It is quite possible that such an agreement, if made by a single man—one who had no one but himself to suffer for his improvidence—would be generally sustained. In truth, the supreme court of Illinois has considered this question, and maintained, as we believe correctly, that

[247] See § 235; Mulliken v. Winter, 2 Duv. 256, 87 Am. Dec. 495; Below v. Robbins, 76 Wis. 600, 20 Am. St. Rep. 89.

[248] Deering Co. v. Ruffner, 32 Neb. 845, 29 Am. St. Rep. 473.

Digitized by Google

the reasons inducing a denial of the power of the head of a family to waive his right of exemption by an executory contract are not applicable to a person who has no one dependent upon him for support, and by his waiver cannot prejudice any but himself.[249] In Pennsylvania an agreement, though prospective in its operation, waiving the benefit of the exemption laws, is enforceable against a debtor, whether the head of a family or not;[250] but it does not deprive him of the right to claim exemption as against other liabilities.[251] The reasons for the rule, as laid down in Pennsylvania, are thus stated in one of the leading cases on this topic: "When at the time of contracting the debt he (the debtor) agrees to waive the benefit of the exemption—and this forms the ground of the credit given him—the injustice of permitting him to violate his contract, and thus to defraud his creditor, is too palpable to need illustration, or to require the aid of precedents to discountenance it. Notwithstanding the benevolent provisions of the statute in favor of unfortunate and thoughtless debtors, it was far from the intention of the legislature to deprive the free citizens of the state of the right, upon due deliberation, to make their own contracts in their own way in regard to securing the payment of debts, honestly due. Creditors are still recognized as having some rights; and it is not the intention of the legislature

[249] Powell v. Daily, 163 Ill. 646. It was said, however, in Mills v. Bennett, 94 Tenn. 652, 45 Am. St. Rep. 763, that it was not material whether defendant was the head of a family or not. This remark was a dictum, the question not being before the court.

[250] Bowman v. Smiley, 31 Pa. St. 225, 72 Am. Dec. 738; Smiley v. Bowman, 3 Grant Cas. 132; Case v. Dunmore, 23 Pa. St. 93; Shelly's Appeal, 86 Pa. St. 373; see Dow v. Cheney, 103 Mass. 181.

[251] Thomas' Appeal, 69 Pa. St. 120.

Digitized by Google

to destroy them by impairing the obligation of contracts. It frequently happens that the creditor is more in need of public sympathy than the debtor. When a poor man is unjustly kept out of money due to him, the distress arising from the want of it is often greater than that caused to the other party by its collection. If the suffering was but equal, it is plain that one man should not suffer for the follies or misfortunes of another; every one should bear his own burden. The statute, which exempts debtors from the operation of this principle, did not take away from them the right to waive the privilege thus conferred, whenever their consciences or their necessities prompted the waiver."[252] The constitution of Alabama, in section 1 of article 10, declares that "the personal property of any resident of this state, to the value of one thousand dollars, to be selected by such resident, shall be exempted from sale on execution or other process of any court issued for the collection of any debt contracted since the thirteenth day of July, 1868." By section 7 of the same article, "the right of exemptions, hereinbefore secured, may be waived by an instrument in writing; and, when such waiver relates to realty, the instrument must be signed by both the husband and wife, and attested by one witness." The operation of this provision in the fundamental law of the state is necessarily to authorize a waiver of all chattel exemptions to be made in writing.[253] A waiver of all exemptions, signed by the husband alone, though invalid as against the homestead, is valid as

[252] Case v. Dunmore, 23 Pa. St. 94; Adams v. Bachert, 83 Pa. St. 524; White Deer Overseer's Appeal, 95 Pa. St. 191; Spitley v. Frost, 5 McCrary, 49.

[253] Brown v. Leitch, 60 Ala. 314, 31 Am. Rep. 42.

Digitized by Google

against all chattel exemptions.[254] "The intention to make such waiver must be clearly expressed." A written expression is essential; hence, a verbal mortgage against exempt property is not enforceable.[255] The code of this state provides that any person may, as to personalty, waive his exemption rights, either by a separate instrument in writing subscribed by him, or a waiver may be included in any bond, bill of exchange, promissory note, or other written contract executed by him.[256] One who relies upon an agreement by his debtor to waive the exemption laws, must, in any action or other proceeding, brought to enforce payment of the debt, allege such waiver, and an issue may be formed and determined in that proceeding, respecting it. If the judgment shows the waiver, it is, of course, conclusive as against the defendant. On the other hand, if the judgment does not establish the waiver, either because it was not pleaded, or because, being pleaded, the court found that it did not exist, the judgment creditor cannot subsequently insist upon the waiver. It must be deemed, either never to have existed, or, if at any time existing, to have been waived by such creditor.[257]

Independently of any statutory or constitutional provision, the courts of Georgia were in harmony with the weight of authority upon the subject, and, hence, deny the power of the debtor to make a contract to waive his exemption rights.[258] The constitution of

[254] Neely v. Henry, 63 Ala. 261; Wagnon v. Keenan, 77 Ala. 519.

[255] Knox v. Wilson, 77 Ala. 309.

[256] Code Ala., §§ 2567, 2568, ed. 1888.

[257] Code Ala., §§ 2570, 2571; Cowrie v. Goodwin, 89 Ala. 569; Agnew v. Walden, 95 Ala. 108.

[258] Stafford v. Elliott, 59 Ga. 837; Green v. Watson, 75 Ga. 471, 58 Am. Rep. 479; Cleghorn v. Greeson, 77 Ga. 343.

Digitized by Google

this state, and statutes enacted by it, confer upon the debtor the power to waive, or renounce in writing his right to the benefit of any exemption from execution, except as to wearing apparel, and not exceeding three hundred dollars' worth of household and kitchen furniture and provisions, to be selected by himself or his wife, if any he has.[259] The waiver need not be averred in any action or proceeding upon the obligation in favor of which the waiver was made, but may be proved aliunde after judgment.[260] A member of a commercial partnership may, in executing a promissory note, in behalf of his firm, waive all rights of exemption, and such waiver is enforceable against the other members, so far as the personal property belonging to the firm is concerned, and no member is entitled to an exemption out of moneys arising from the sale of such property by a receiver.[261] In this state, the waiver by a debtor of all exemption of his wages or salary, unlimited as to time or employment, is deemed against public policy, and treated as inoperative and void.[262]

Under the statutes of Kansas, "a tenant may waive in writing the benefit of the exemption laws of the state for all debts contracted for rents." [263] This statute has been held not to confer the power to waive a right of exemption from execution of moneys due for the debtor's personal services.[264]

The courts of Pennsylvania, which we believe are the only ones which have sanctioned prospective waiv-

[259] Cons. Ga., § 3, art. 9; Code Ga., ed. 1895, § 2863.
[260] Flemister v. Phillips, 65 Ga. 676.
[261] Hahn v. Allen, 93 Ga. 612.
[262] Green v. Watson, 75 Ga. 471, 58 Am. Rep. 479.
[263] Hoisington v. Huff, 24 Kan. 379.
[264] Burke v. Finley, 50 Kan. 424, 34 Am. St. Rep. 132.

Digitized by Google

ers of exemption rights, unless compelled to do so by statutory or constitutional provision, have repented of their folly. A statute of that state, passed in 1845, declared that "the wages of any laborers, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer." A laborer executed a note containing a waiver of all exemption laws in force in the state. In refusing to enforce such waiver, the supreme court of the state said: "If it were res integra; if, with the experience and observation we have had, we were now for the first time to pass upon the question whether debtors could waive their rights under the act of 1849, or widows theirs, under the act of 14th of April, 1851—we would be very likely to deny it altogether, and stick to the statutes as they are written. And here we have a new case. We have never decided that a debtor may repeal the proviso of the act of 1845, and public policy pleads strongly against such a decision. If we make it, we bring on the litigation which has sprung out of our decision upon the act of 1849—the inconveniences to employers, before adverted to, and the temptation to weak debtors to beggar their families in behalf of sharp and grasping creditors. We will not, therefore, strain the proviso to fit it to our construction of the exemption statutes, but will leave it to its natural operation as it is expressed. The legislature, having said that justices shall not attach wages, we will say they shall not, though a particular debtor has said they may. It is to be observed that the garnishee has rights in the premises, and he is under the act of assembly, but is not a party to the agreement which his laborer makes with a creditor. Why should he be annoyed and subjected to costs, his

Digitized by Google

work hindered, and his hands deprived of their daily bread, by an agreement between others to which he was not a party, and of which he had no notice? Why should such an agreement be made a rule of law to garnishees, instead of a statute which they knew of when they made their business arrangements and employed their laborers, and which they had a right to expect would be administered as it is written?" [265]

In the other states, where no statutory or constitutional provision has been enacted or adopted, authorizing agreements, waiving the right to claim the exemption of property from execution, such agreements are treated as against public policy and are declared void. The reasons for thus treating them are well and conclusively stated by Denio, J., in an opinion pronounced in the New York court of appeals. He said: "The statutes which allow a debtor, being a householder, and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity, which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words contained in any note or obligation, would operate to change the law between those parties, and so far disappoint the intentions of the legislature. If effect shall be given to such provisions, it is likely that they will generally be inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man, who contracts a debt, expects to pay it, and believes he will be able to do so without having his property sold un-

[265] Firmstone v. Mack, 49 Pa. St. 387, 88 Am. Dec. 507.

Digitized by Google

der execution. No one worthy to be trusted would, therefore, be apt to object to a clause subjecting all his property to levy on execution, in case of nonpayment. It was against the consequences of this overconfidence, and the readiness of men to make contracts, which may deprive them and their families of articles indispensable to their comfort, that the legislature has undertaken to interpose. When a man's last cow is taken on an execution, on a judgment rendered upon one of these notes, it is no answer to say that it was done pursuant to his consent, freely given, when he contracted the debt. The law was designed to protect him against his own improvidence in giving such consent. The statutes contain many examples of legislation, based on the same motives. The laws against usury, and those which forbid imprisonment for debt, and those which allow a redemption after the sale of land on execution, are of this class. So, of the principle originally introduced by courts of equity, and which has been long established in all courts, to the effect that if one convey land as security for a debt, and agree that his deed shall become absolute, if payment is not made by the day, he shall be entitled to redeem, on paying the debt and interest; and so, also, of executory contracts without consideration to make gifts, and the like. In these cases, the law seeks to mitigate the consequences of men's thoughtlessness and improvidence; and it does not, I think, allow its policy to be evaded by any language which may be inserted in the contract. It is not always equally careful to shield persons from those acts which, instead of being promissory in their character and prospective in their operation, take effect immediately. One may turn out his last cow on

Digitized by Google

execution, or may release an equity of redemption, and he will be bound by the act. In thus discriminating, the law takes notice of the readiness with which sanguine and incautious men will make improvident contracts, which look to the future for their consummation, when, if the results were to be presently realized, they would not enter into them at all. If, with the consequences immediately before them, they will do the act, they will not generally be allowed to retract; it being supposed, in such cases, that valid reasons for the transaction may have existed, and that, at all events, the party was not under the illusion which distance of time creates. Ordinarily, men are held to their executory, as well as their executed contracts; but in a few exceptional cases, where the temptation is great, or the consequences peculiarly inconvenient, parties are not allowed to make valid prospective agreements. The present is, in my opinion, one of those cases."[266] So the court of appeals of Kentucky, in a recent decision, said: "Executory agreements are generally enforced, and as much obligatory on parties as if in fact executed; but there are exceptions to this general rule. No one in this state is entitled to the benefit of the exemption laws but a housekeeper with a family; and the legislature certainly intended, by the enactment of such laws, to provide more for the dependent family of the debtor than for the debtor himself. Every honest man has a desire to fulfill all his obligations, and such are always willing to comply with the demands of a creditor, by giving to the latter any assurance he may exact as evidence of his intention to pay his debt. The law, in its wisdom for the poor and needy, has said

[266] Kneettle v. Necomb, 22 N. Y. 249, 78 Am. Dec. 186.

Digitized by Google

that certain property shall not be liable for debt, not so much to relieve the debtor as to protect his family against such improvident acts as reduce the family to want. Such is the policy of the law; and this contract was made, not only in disregard of this policy, but to annul the law itself, so far as it affected the debt sought to be recovered. If such a contract is upheld, the exemption law of the state would be a blank upon the statute-book, and deprive the destitute of all claim they have to its beneficent provisions." [267] "Such contracts contravene the policy of the law, and, hence, are inoperative and void. The owner may, if he chooses, sell or otherwise dispose of any property he may have, however much his family may need; but the law will not aid him in that regard, nor permit him to contract, in advance, his creditor may use the process of the courts to deprive his family of its benefit and use, when an exemption has been created in their favor. Laws enacted from considerations of public concern, and to subserve the general welfare, cannot be abrogated by mere private agreement." [268]

§ 217. **The Liabilities against Which the Benefit** of an exemption law may be claimed are to be discovered, first, by the inspection of the statute, and next,

[267] Moxley v. Ragan, 10 Bush, 156, 13 Am. Law Reg., N. S., 743, 19 Am. Rep. 61; Crawford v. Lockwood, 9 How. Pr. 547; Maxwell v. Reed, 7 Wis. 582; Levicks v. Walker, 15 La. Ann. 245, 9 Am. Law Reg. 112; Curtis v. O'Brien, 20 Iowa, 376, 89 Am. Dec. 543; Harper v. Leal, 10 How. Pr. 282.

[268] Recht v. Kelly, 82 Ill. 147, 25 Am. Rep. 301; Carter v. Carter, 20 Fla. 558, 51 Am. Rep. 618; Phelps v. Phelps, 72 Ill. 545, 22 Am. Rep. 149; Branch v. Tomlinson, 77 N. C. 388; Van Wickle v. Landry, 30 La. Ann. 330; Denny v. White, 2 Cold. 283, 88 Am. Dec. 596; Curtiss v. Ellenwood, 59 Ill. App. 110; Mills v. Bennett, 94 Tenn. 651, 45 Am. St. Rep. 763; Moran v. Clark, 30 W. Va. 358, 8 Am. St. Rep. 66.

Digitized by Google

by considering whether the statute is liable to any constitutional objection. In several of the states, the privilege of exemption can be asserted only against judgments, founded in contract, and not against judgments founded in tort.[269] Hence, in these states, there is no chattel exemption against a judgment in ejectment for damages for the unlawful withholding of real estate, nor can parol evidence be received to show, in opposition to the record, that the judgment was of the class against which the exemption was allowable.[270] If the judgment against the husband is for damages, occasioned by the tort of his wife, his liability is regarded as founded on tort, and not in the contract of marriage, and he is not entitled to any exemption.[271] A judgment for the amount of a statutory penalty, as where a recovery is had for the penalty given by statute against a mortgagee for failure to acknowledge on the record the satisfaction of his mortgage, is not founded on contract, and, therefore, not subject to chattel exemptions.[272] It is sometimes difficult to determine whether an action is for a tort or for a breach of a contract. Considered in connection with the exemption laws, all demands which are not based upon contracts, must be deemed founded in tort, and, hence, the benefit of the exemption laws

[269] Kenyon v. Gould, 61 Pa. St. 292; Commonwealth v. Dougherty, 28 Leg. Int. 14; Lane v. Baker, 2 Grant Cas. 424; State v. Melogue, 9 Ind. 196; Lauck's Appeal, 24 Pa. St. 426; Massie v. Enyart, 33 Ark. 688. This rule was applied to homestead exemptions in Robinson v. Wiley, 15 N. Y. 489; Cook v. Newman, 8 How. Pr. 523; Lathrop v. Singer, 39 Barb. 396; Davis v. Henson, 29 Ga. 345. It is doubtful whether costs are to be regarded as a demand growing out of contract. In re John Owens, 7 Chic. L. N. 371.

[270] Smith v. Wood, 83 Ind. 522.

[271] McCabe v. Berge, 89 Ind. 225.

[272] Williams v. Bowden, 69 Ala. 433.

Digitized by Google

cannot be maintained against an execution thereon in those states in which those benefits attach only to judgments based upon contracts. Thus if, in an action of detinue for personal property, and for damages for the use thereof while detained by the defendant, no element of contract is involved, the right of the plaintiff to recover results from the tortious action of the defendant in withholding the property and not from a contract, express or implied, to pay therefor. Hence, he is not entitled to any exemption against an execution issued on the judgment.[273] In Indiana, a judgment against a physician and surgeon for damages suffered from his malpractice is regarded as a tort, and does not entitle the defendant to the benefit of the exemption laws against an execution issued thereon.[274] In Alabama, an action against a common carrier for injuries to goods while in his possession, which he failed to deliver in good condition, as required by his contract or obligation to carry, has been adjudged to be in contract.[275] If, in that state, a judgment is rendered against an executor or administrator personally, it is necessarily founded upon his devastavit, or, in other words, upon his tort, and he is not entitled, as against it, to the benefit of the exemption laws.[276]

Costs are but an incident to the judgment, and, so far as exemptions are concerned, must be treated as of the same nature as the judgment. Hence, if the plaintiff recovers, the costs are included in, and

[273] Stuckey v. McKibbon, 92 Ala. 622.

[274] Goble v. Dillon, 86 Ind. 327, 44 Am. Rep. 308; De Hart v. Haun, 126 Ind. 378.

[275] McCarthy v. Louisville etc. Co., 102 Ala. 193, 48 Am. St. Rep. 29; McDaniel v. Johnson, 110 Ala. 526.

[276] Dangaix v. Lunsford, 112 Ala. 403.

Digitized by Google

become a part of his judgment, and the exemption does not prevail against him.[277] The rule is the same where, in an action for an alleged tort, the plaintiff fails, and the defendant recovers judgment for his costs.[278] The rule, that costs are but an incident of a judgment, and, hence, partake of its character, or rather, of the character of the obligation upon which it is founded, is, we think, applicable only when some recovery has been had upon the cause of action disclosed by the complaint. It may be that the recovery, whether in favor of the plaintiff or of the defendant, is for costs only. If so, it stands alone, and does not acquire any color or character from the cause of action. The duty of paying costs is one imposed by law. It does not arise upon contract. Hence, there can be no exemption against a judgment for costs alone, where the statute limits the right of exemption of process for any debt, growing out of, or founded upon, a contract, express or implied.[279] "Following the logic of the doctrine declared in the authorities, the conclusion is coerced that a judgment for costs, disconnected from any other judgment for recovery, whether in an action ex delicto or ex contractu, is purely statutory, and is not a debt growing out of, or founded upon, a contract, within the meaning of our exemption laws."[280]

It is doubtless true, as suggested, that a judgment cannot be contradicted for the purpose of showing that the defendant is, or is not, entitled to an exemp-

[277] Massie v. Enyart, 33 Ark. 688; State v. McIntosh, 100 Ind. 439; Church v. Hay, 93 Ind. 323; Stuckey v. McKibbon, 92 Ala. 622.

[278] Russell v. Cleary, 105 Ind. 502.

[279] Ross v. Banta (Ind.), 34 N. E. 865; State v. McIntosh, 100 Ind. 439; Russell v. Cleary, 105 Ind. 502; Ross v. Banta, 140 Ind. 141.

[280] Donaldson v. Banta, 5 Ind. App. 17.

Digitized by Google

tion.[281] The judgment itself is often silent upon this subject. When such is the case, it is competent for all persons having any interest in determining the question to examine the pleadings for the purpose of ascertaining the nature of the cause of action which has merged in the judgment.[282]

In many of the states, the privilege of exemption from execution is not restricted to judgments in actions upon contracts, but extends to judgments of every character, irrespective of the nature of the cause of action, or the form of proceeding from which they resulted, and is, hence, capable of assertion against judgments for tort, and in criminal prosecutions, as

[281] Pickrell v. Jerauld, 1 Ind. App. 10, 50 Am. St. Rep. 192.

[282] McDaniel v. Johnson, 110 Ala. 526. This case professes to be in harmony with McLaren v. Anderson, 81 Ala. 106, but we are entirely unable to reconcile them. In the latter case a claim of exemption was made, and was disregarded by the officer on the ground that the judgment was founded in tort. He therefore proceeded to sell, and the defendant thereafter moved to vacate the sale. This motion was granted, the court saying: "If the judgment and execution had disclosed on their face that the recovery was for a tort, it would have been the duty of the sheriff to disregard the claim as frivolous, and to proceed and make the sale. The execution, however, gave him no such information. It could not do so without going beyond the judgment entry, which the clerk was not authorized to do. It recited only a money judgment; all it was permitted to do. In Block v. Bragg, 68 Ala. 291, we said: 'It is not the province of the officer to pass upon the sufficiency of the claim of exemption nor of the affidavit of contest. If sufficient they would be amenable in the court from which the process issued, and to that tribunal their sufficiency must be referred.' See, also, Block v. George, 70 Ala. 409. We consider it unsafe to hold that the sheriff may inquire behind the face of the process in his hands, and determine for himself that the judgment rests on a cause of action, against which homestead exemption is unavailing. And the clerk, having in his office, filed in the cause, a claim of homestead exemption, valid on its face, should have issued no process for the sale of the land until that claim was disposed of by an order of the court." Contrast this with the following from the later opinion in 110 Ala. 531: "It has never been the practice,

Digitized by Google

well as against those based upon contract liabilities.[283] In Arkansas, the action for use and occupation "is in all respects of the nature of assumpsit at common law on an implied promise, and is an action ex contractu, and not ex delicto." The judgment recovered in such action is subject to all exemption privileges.[284]

In Kansas, the personal property of the debtor is not exempt as against the claim of a clerk, mechanic, laborer, or servant, for wages;[285] while in Minnesota it was determined that the legislature was prohibited from making a like exception in the exemption statute, under a constitution commanding that a certain

nor supposed to be necessary, to recite in the entry of judgments, or for it to appear in any way thereby, whether the action and recovery are ex contractu or ex delicto. In cases arising under § 2328 of the code, it has been the custom of trial courts and of this to look to the complaint—the character of the plaintiff's claim—to determine whether the judgment is upon contract or for a tort. Iron Co. v. Mangun, 67 Ala. 246; McAllister v. Dow, 26 Ala. 453; Reid v. Gordon, 2 Stew. 469; Galle v. Lynch, 21 Ala. 579; Williams v. Perkins, 1 Port. 471. And, as under § 2328 of the code, the practice of looking to the complaint for the character of the action with a view to allowing or disallowing a claim of exemption against the judgment accordingly as the complaint sought the recovery of a debt or damages for a tort has been uniform and hitherto unquestioned. Meredith v. Holmes, 68 Ala. 190; Williams v. Bowden, 69 Ala. 433; Penton v. Diamond, 92 Ala. 610; Stuckey v. McKibbon, 92 Ala. 624; and in McLaren v. Anderson, 82 Ala. 107, this court expressly refers its conclusion to the fact that the judgment, against an execution on which a claim of exemption was asserted, was shown by the pleadings in the cause to have been rendered in an action ex delicto. And it has been expressly held that the complaint should be looked to for the purpose of determining the capacity in which the plaintiff recovered judgment (Rhodes v. Walker, 44 Ala. 213), and for the purpose of identifying the parties. Collins & Co. v. Hyslop & Son, 11 Ala. 508; Flack v. Andrews, 86 Ala. 395."

[283] Loomis v. Gerson, 62 Ill. 11; Conroy v. Sullivan, 44 Ill. 451; Dellinger v. Tweed, 66 N. C. 206; Smith v. Omans, 17 Wis. 395.

[284] St. L., I. M. & S. Ry. Co. v. Hart, 38 Ark. 112.

[285] Reed v. Umbarger, 11 Kan. 206; McBride v. Reitz, 19 Kan. 123.

Digitized by Google

portion of the property of the debtor be exempt from all debts.[286] In the absence of constitutional provisions upon the subject, there is no objection to refusing the privilege of exemption, as against debts of such a character that to permit the exemption laws to operate against them will probably work a greater injury or deprivation to the needy, than by allowing such exemptions. Hence, there is a growing tendency, where a claim is for the personal services of laborers, servants, clerks, and other employés, either to wholly deny the privilege of exemption, or to greatly restrict it.[287] In some of the states, to avoid the exemption, it is necessary for the judgment to show that it is for a démand, against which the exemption is inoperative.[288] Under this and similar statutes, some difficulty must be experienced in determining whether a person, claiming that no exemption exists as against his judgment, is a laborer or servant within the meaning of the statute. We cannot here give any extended consideration to this question. As a general rule, these exceptions in favor of laborers apply only to those who work with their own hands, and not to those who employ others to work for them, or who themselves work by the aid of expensive and complicated machinery.[289]

[286] Tuttle v. Strout, 7 Minn. 465, 82 Am. Dec. 108.

[287] Rev. Stat. D. C. 1897.

[288] Stroup v. Hobbs, 65 Ill. App. 296; Buis v. Coper, 63 Mo. App. 196.

[289] Consolidated etc. Co. v. Hunt, 83 Iowa, 6, 32 Am. St. Rep. 285; Wildner v. Ferguson, 42 Minn. 112, 18 Am. St. Rep. 495; Henderson v. Nott, 36 Neb. 154, 38 Am. St. Rep. 720; Wakefield v. Fargo, 90 N. Y. 213; Johnston v. Barrills, 27 Or. 251, 50 Am. St. Rep. 717; Selder's Appeal, 46 Pa. St. 57; Wentroth's Appeal, 82 Pa. St. 469; Campfield v. Lang, 25 Fed. Rep. 128.

Digitized by Google

Various other debts may be designated by the legislature as of a character against which no exemption from execution ought to be allowed, as where a judgment is against an attorney for moneys collected by him in his professional capacity, or against one who has been guilty of fraud or false pretenses in contracting the debt.[290]

It has been held that the state cannot be affected by exemption laws, unless the intention to so affect it is declared by the statute in express terms,[291] and this ruling is certainly sustained by a rule, whose existence and propriety were always affirmed by the common law, to wit, "that in the construction of statutes, declaring or affecting rights and interests, general words do not include the state, or affect its rights, unless it be specially named, or it be clear, by necessary implication, that the state was intended to be included."[292] The weight of the decisions, however, at the present time is, that as the object of these laws is to secure to the poorest and most numerous class of the community the means of support, the state is within the policy of its own legislation upon this subject-matter, and is, therefore, bound by these laws, and cannot enforce its claims against the exemptions therein granted,[293] except upon the same cause of action, against which a claim of exemption would be unavailing, if the judgment were in favor of a private person.[294] It is now settled that the right to exemp-

[290] Schreck v. Gilbert, 52 Neb. 813; Taylor v. Rice, 1 N. D. 72.

[291] Commonwealth v. Cook, 8 Bush, 220, 8 Am. Rep. 456.

[292] Cole v. White County, 32 Ark. 51.

[293] Gladney v. Deavors, 11 Ga. 79; State v. Williford, 36 Ark. 155, 38 Am. Rep. 34; State v. Pitts, 51 Mo. 133; Conroy v. Sullivan, 44 Ill. 451; Loomis v. Gerson, 62 Ill. 13; Commonwealth v. Lay, 12 Bush. 283.

[294] Vincent v. State, 74 Ala. 274.

Digitized by Google

tion exists against judgments in favor of the United States. After referring to the various statutes upon the subject of writs of execution from the national courts, the supreme court announced the following conclusion: "It is further to be observed that no distinction is made in any of these statutes on the subject, between executions on judgments in favor of private parties, and on those in favor of the United States. And, as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that the exemption from levy and sale, under executions of one class, apply equally to all, including those on judgments recovered by the United States." [295]

Property is generally, and we believe universally,[296] subject to an execution for the purchase price thereof.[297] It is necessary that the plaintiff be able to point out the property purchased of him by the defendant and separate it from property acquired from other sources. Thus, if a merchant, in purchasing goods intended for sale, mixes them with others of like nature, so that it can no longer be ascertained from whom any particular parcel was purchased, this does not render the whole stock liable to execution in favor of an unpaid vendor, or any part thereof. On

[295] Fink v. O'Neil, 106 U. S. 279.

[296] Friedman v. Sullivan, 48 Ark. 213; Behymer v. Cook, 5 Colo. 395; Rodgers v. Brackett, 34 Minn. 279; Roberts v. McGur, 82 Mich. 221; Straus v. Rothan, 102 Mo. 261.

[297] For application of this rule to homestead cases, see Montgomery v. Tutt, 11 Cal. 190; Skinner v. Beatty, 16 Cal. 156; McGhee v. Way, 46 Ga. 282; Kitchell v. Burgwin, 21 Ill. 40; Phelps v. Connover, 25 Ill. 309; Barnes v. Gay, 7 Iowa, 26; Pratt v. Topeka Bank, 12 Kan. 570; Stevens v. Stevens, 10 Allen, 146, 87 Am. Dec. 630; Buckingham v. Nelson, 42 Miss. 417; Ulrich's Appeal, 48 Pa. St. 489; Fehley v. Barr, 66 Pa. St. 196; Burford v. Rosenfield, 37 Tex. 42; Perrin v. Sergeant, 33 Vt. 84.

Digitized by Google

the contrary, the defendant is entitled to his exemption as against each and every vendor, because neither can prove that the goods seized by him were by him sold to the defendant.[298] It is not fatal to the claim of the plaintiff that the debt has changed its form, as where a note has been taken for the purchase price,[299] nor is it material that security has been taken for the debt.[300] It has been held that a claim for purchase money need not have arisen in favor of the seller of property, and that one who lent money to be used, and which was used, in the purchase of a chattel has a claim for purchase money against which the exemption of the chattel from execution cannot be successfully urged.[301] A judgment for the conversion of

[298] Wagner v. Olson, 3 N. D. 69.

[299] Rogers v. Brackett, 34 Minn. 279.

[300] Roberts v. McGur, 82 Mich. 221.

[301] Houlehan v. Rassler, 73 Wis. 557. "The main question in this case was whether the property levied upon by the defendant as constable was exempt. We are compelled to differ from the learned circuit court on that question, and to hold that the property was not exempt. The statute is very plain and explicit, and is susceptible of but one meaning, and the facts found bring this property clearly within its very terms. The plaintiff in the case in which the execution was issued 'loaned to the plaintiff, at his special instance and request, eighty dollars, to be used by said plaintiff in purchasing, and to enable him to purchase, a team of horses and their harness of one J. Murray; and that said eighty dollars were used by said plaintiff in making said purchase, and were by him paid to said J. Murray as a part of the consideration for said horses and harness.' I repeat these facts here, to show how clearly they come within the very terms of the statute. The statute is: 'No property exempt by the provisions of this statute shall be exempt from execution issued upon a judgment in an action brought by any person for the recovery of the whole or any part of the purchase money of the same property.' Subd. 20, § 2982, R. S. Was this eighty dollars any part of the purchase money of the property? It was loaned to be used in purchasing the property, and to enable the plaintiff to purchase it, and was actually used in making the purchase, and was paid to Murray as a part of the consideration of it. What other possible language could be used that is stronger

Digitized by Google

goods is not, it is said, within the benefit of this rule.[302] It has been held that the judgment must be in favor of the vendor, and therefore that the transferee of a note given for purchase money has no immunity from the claim for exemption.[303] Upon this subject the authorities are very evenly divided, and we think those extending to an assignee of a vendor the same immunity from the exemption laws to which he was entitled are supported by the better reasoning.[304]

So if the vendee transfers the property, it is no longer subject to levy under a judgment against the vendee for purchase money.[305] A judgment is not for the purchase money, unless it is against the purchaser,[306] and is based upon the contract made between the vendor and the vendee. Hence, one who has become a surety for the purchaser, and has been compelled to pay the purchase price, cannot, on recovering against the purchaser, seize property exempt from execution.[307] The contract of the purchaser's surety is not a contract for the payment of purchase money within the meaning of the statutes of exemption.[308] The judgment must be exclusively for purchase money. If other items of indebtedness are included, the right

or more explicit to make that money a part of the purchase money of the property? And yet the contention is that it was not, and the court gave that as a reason for the finding. The fact and the terms of the statute are too plain to admit of argument. It is contended that the one who loans the money should have actually paid it to the person who sold the property. The statute does not say so."

[302] Hoyt v. Van Alstyne, 15 Barb. 568.

[303] Shepard v. Cross, 33 Mich. 96; Weil v. Nevitt, 18 Colo. 10.

[304] Langevin v. Bloom, 69 Minn. 22; State v. Orahood, 27 Mo. App. 496.

[305] Haworth v. Franklin, 74 Mo. 106.

[306] Buckingham v. Nelson, 42 Miss. 417.

[307] Harley v. Davis, 16 Minn. 487.

[308] Davis v. Peabody, 10 Barb. 91; Smith v. Slade, 57 Barb. 637.

Digitized by Google

to take exempt property is waived.[309] "The principle to be deduced from the cases is that, when a creditor has two classes of claims against his debtor, by uniting them in one suit, and obtaining judgment, he reduces that in which his rights are superior to a level with that in which they are inferior.[310] Where wages are exempt, except in a suit for necessaries, they are exempt in an action on a judgment for necessaries. By the judgment in the first action, the old debt is merged or extinguished. The nature of the security is changed. An action on such judgment "is not for necessaries furnished within the meaning of the statute." [311] A judgment for the purchase price of one article seems, in New York, to authorize the taking of other exempt property.[312] Under an execution for the purchase price of a homestead, the debtor's crop raised thereon, if otherwise exempt, is not subject to execution.[313] In some of the states a homestead is not exempt from an execution based on a debt which accrued prior to its purchase [314] or occupancy.[315]

§ 218. Exempt Property may be Sold or Pledged.— The power of the owner of exempt property, unless limited by statute, to sell or encumber it is undoubted.[316] The right of exemption is a privilege, but not a re-

[309] Hickox v. Fay, 36 Barb. 9.

[310] Holmes v. Farris, 63 Me. 318.

[311] Brown v. West, 73 Me. 23.

[312] Cole v. Stevens, 9 Barb. 676; Snyder v. Davis, 47 How. Pr. 147; 1 Hun, 350; Craft v. Curtiss, 25 How. Pr. 163; contra, Hickox v. Fay, 36 Barb. 9.

[313] Johnson v. Holmes, 49 Ga. 365.

[314] Laing v. Cunningham, 17 Iowa, 510; Tucker v. Drake, 11 Allen, 145; Brainard v. Van Kuran, 22 Iowa, 261. See § 249.

[315] Hale v. Heaslip, 16 Iowa, 451; Hyatt v. Spearman, 20 Iowa, 510; Delevan v. Pratt, 19 Iowa, 429.

[316] Jones v. Scots, 10 Kan. 33; Bevan v. Hayden, 13 Iowa, 127.

Digitized by Google

straint. In fact, the owner's power to dispose of exempt property is more absolute than it is over other kinds of property. This is because of the freedom of exempt property from involuntary liens. Not being subject to execution, the owner may sell it, pledge it, or give it away, notwithstanding the existence of judgment or execution liens, and without reference to the rights of his general creditors.[317] In some of the states this rule is not applicable to homesteads. In these states, judgment liens were held to apply to homesteads, so that the alienee of a homestead estate held it subject to sale under judgments against his grantor.[318] But, except under statutes clearly indicating that such is to be the case, there is no reason why homesteads should form an exception to the general rule that exempt property may be transferred free of all judgments and executions which were not enforceable against the property in the hands of the vendor.[319] A transfer of exempt property may be assailed on the ground that it was made for the purpose of defrauding the creditors, but if it was exempt from execution, and they had no right to levy upon and sell it while it belonged to the debtor, his transfer, whatever his inten-

[317] Pool v. Reid, 15 Ala. 826; Godman v. Smith, 17 Ind. 152; Vandibur v. Love, 10 Ind. 54; Finley v. Sly, 44 Ind. 266; Paxton v. Freeman, 6 J. J. Marsh. 234, 22 Am. Dec. 74; Jones v. Scott, 10 Kan. 33; Cook v. Baine, 37 Ala. 350; Denny v. White, 2 Cold. 283, 88 Am. Dec. 597; Smith v. Allen, 39 Miss. 469; Moseley v. Anderson, 40 Miss. 49; Buckley v. Wheeler, 52 Mich. 1; Frost v. Shaw, 3 Ohio St. 270; Vaughan v. Thompson, 17 Ill. 78; ante. § 197; Kulage v. Schueler, 7 Mo. App. 250; Barnard v. Brown, 112 Ind. 53.

[318] Hoyt v. Howe, 3 Wis. 752; Folsom v. Carli, 5 Minn. 335, 80 Am. Dec. 429; Tillotson v. Millard, 7 Minn. 513, 82 Am. Dec. 112; Smith v. Brackett, 36 Barb. 571.

[319] Monroe v. May, 9 Kan. 475; Freeman on Judgments, sec. 355; Morris v. Ward, 5 Kan. 247; Lamb v. Shays, 14 Iowa, 567; Wiggins v. Chance, 45 Ill. 175.

Digitized by Google

tion, could not operate to defraud them, because it could not remove beyond their reach anything which they were entitled to take under execution.[320] Upon the theory that the exemption of property is a personal privilege, it has often been held that, after its transfer, such claim cannot be asserted by the transferee, and hence that it may be taken in execution under a writ against the vendor, if, but for such transfer, it might have been taken had he not interposed his claim of exemption. Practically this amounts to holding that a transfer of exempt property is effective as a waiver of its exemption where, at the time of the transfer, a judgment or execution lien exists against the transferee.[321] But exempt property is not subject to execution, and therefore is not subject to the lien of a judgment or execution. Its owner has the right to sell and transfer it, and his vendor holds it free from the right to take it in execution for the payment of the latter's debts, and may assert the right of exemption, whether the vendor joins in the assertion or not.[322]

In the absence of any statutory limitations, the power of the debtor to sell or incumber his exempt property remains precisely as if it were not exempt, and his wife, unless the statute so provides, need not join in the sale or transfer, though the exemption is

[320] Barry v. Hanks, 28 Ill. App. 51; Taylor v. Duesterberg, 109 Ind. 165; State v. Koch, 47 Mo. App. 269; Union Pac. Ry. v. Smersh, 22 Neb. 174, 3 Am. St. Rep. 290; Derby v. Weyrich, 8 Neb. 174, 30 Am. Rep. 827; Carhart v. Harshaw, 45 Wis. 340, 30 Am. Rep. 752.

[321] Wyman v. Gay, 90 Me. 136, 60 Am. St. Rep. 238; Lane v. Richardson, 104 N. C. 642.

[322] Pickrell v. Jerauld, 1 Ind. App. 10, 50 Am. St. Rep. 192; Bransard v. Brown, 112 Ind. 53; Ray v. Varnell, 118 Ind. 112; Waugh v. Bridgford, 69 Iowa, 336; Redfield v. Stocker, 91 Iowa, 383; Millington v. Lauere, 89 Iowa, 322, 48 Am. St. Rep. 385; Whitney v. Gammon, 103 Iowa, 363.

Digitized by Google

as much for her benefit as for his.[323] Some limitations in the power of a debtor to dispose of his exempt property have been imposed by statute. Thus, in Ohio, a married man is prohibited from selling, disposing of, or in any manner parting with any personal property exempt from sale under execution, without first obtaining the consent of his wife. Should he violate this statute, his wife may, in her own name, prosecute to final judgment a civil action for the recovery of the property or the value in money.[324] In Indiana, after real property has been selected as exempt, and has been appraised, and set apart to the debtor, it can no longer be sold by him except by a deed in which his wife unites with him, acknowledged in due form of law.[325]

Owing to some ambiguity in exemption statutes, whereby they purported to exempt certain chattels from forced sale under execution, it has often been insisted that a mortgage thereof is invalid because it cannot be enforced otherwise than by a forced sale. The courts have, with substantial uniformity, denied the claim, and held that the mortgage was valid, and that its foreclosure was not one of the forced sales against which the statute provided. To this extent there may be a valid prospective waiver of exemption rights.[326] Under the statute of Ohio, referred to above, a mortgage of exempt property in which the wife does not assent cannot be enforced against her, because it is within the meaning of that statute a disposing of and

[323] Carpentier v. Bresnahan, 62 Mich. 360.

[324] Slanker v. Beardsley, 9 Ohio St. 589.

[325] Sullivan v. Winslow, 22 Ind. 153.

[326] Patterson v. Taylor, 15 Fla. 336; Love v. Blair, 72 Ind. 281; Cronan v. Honor, 10 Heisk. 533.

Digitized by Google

parting with property.[327] A mortgage or pledge of exempt property is not an unconditional or general waiver of the mortgagor's exemption rights therein. The waiver entitles the mortgagee or pledgee to subject the property to the satisfaction of his claim, in like manner and with the same effect as if it were not exempt;[328] but with respect to other creditors, the property is exempt to the same extent as before the mortgage was given.[329]

§ 219. The Constitutionality of Exemption Laws, when sought to be applied to debts contracted prior to their passage, has been frequently discussed. Chief Justice Taney considered the question incidentally in Bronson v. Kinzie,[330] saying: "Undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence

[327] Colwell v. Carper, 15 Ohio St. 279.
[328] Jones v. Scott, 10 Kan. 33; Frost v. Shaw, 3 Ohio St. 270.
[329] Collett v. Jones, 2 B. Mon. 19, 36 Am. Dec. 586.
[330] 1 How. 315.

Digitized by Google

and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional." Long prior to the decision of Bronson v. Kinzie, it had become well settled that it was within the power of the state legislatures to abolish imprisonment for debt, and to make the abolition applicable to prior as well as to future liabilities.[331] The language of that decision unquestionably led to the conclusion that exemption laws pertained to the remedy merely, and, unless so unreasonable as to render unavoidable the inference that they were enacted with the view of impairing the obligation of pre-existing contracts, they were sustained and enforced even against such contracts,[332] unless we may regard the decisions in Missouri, upon the statute exempting the property of wives from executions against their husbands, as an exception to the general current of the authorities.[333] But the statutes in regard to homesteads attempted to withdraw property of considerable value from the reach of execu-

[331] Sturges v. Crowninshield, 4 Wheat. 200; Beers v. Haughton, 9 Pet. 359; Woodfin v. Hooper, 4 Humph. 13; Fisher v. Lacky, 6 Blackf. 373; Newton v. Tibbatts, 2 Eng. 150.

[332] Hardeman v. Downer, 39 Ga. 425; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103; overruling Danks v. Quackenbush, 1 N. Y. 129, and Quackenbush v. Danks, 1 Denio, 128; Rockwell v. Hubbell, 2 Doug. (Mich.) 197; Cusic v. Douglas, 3 Kan. 123, 87 Am. Dec. 458; Sneider v. Heidelberger, 45 Ala. 126; Gray v. Munroe, 1 McLean, 528; Evans v. Montgomery, 4 Watts & S. 218; Grimes v. Bryne, 2 Minn. 89; Stephenson v. Osborne, 41 Miss. 119; Mede v. Hand, 5 Am. Law. Reg., N. S., 82; Bigelow v. Pritchard, 21 Pick. 169; Von Hoffman v. City of Quincy, 4 Wall. 535; In re John Owens, 7 Chic. L. N. 397.

[333] Cunningham v. Gray, 20 Mo. 170; Tally v. Thompson, 20 Mo. 277; Harvey v. Wickham, 23 Mo. 112; Hockaday v. Sallee, 26 Mo. 219.

Digitized by Google

tions, and occasioned the constitutionality of exemption laws to be discussed anew. It would seem that the principles applicable to the exemption of personal property would apply with equal force to real estate. If a state, without impairing the obligation of contracts, may exempt certain personal property upon which the creditor had a right to rely for payment at the creation of the contract, why may it not also exempt certain real estate? It is true that implements of husbandry and the tools of mechanics, with other means of obtaining livelihood, are almost indispensable to the debtor; but not less so than a place in which to shelter his family. And after all, the question is not one of hardship or of necessity. It is whether the value of the contract made anterior to the passage of the law is impaired by enforcing the law. Whatever the courts may ultimately determine, it will always require a great deal of sophistry to make it seem that an obligation which could be wholly or partly enforced but for the operation of some law is not impaired by that law. When the constitutionality of homestead laws purporting to be applicable to antecedent debts was first discussed, it was sustained,[334] because it was correctly thought to be upheld by the language of Chief Justice Taney, in Bronson v. Kinzie. But later decisions show that state laws or constitutions enlarging homestead exemptions, or creating such exemptions where none before existed, are unconstitutional in so far as they apply to liabilities created before their passage.[335]

[334] Hardeman v. Downer, 39 Ga. 425; Cusic v. Douglas, 3 Kan. 123, 87 Am. Dec. 458; Mede v. Hand, 5 Am. Law Reg., N. S., 82.

[335] Gunn v. Barry, 15 Wall. 610; 5 Leg. Gaz. 193; The Homestead Cases, 22 Gratt. 266, 12 Am. Rep. 507; Grant v. Cosby, 51 Ga. 460; Cochran v. Darcy, 6 Chic. L. N. 230; Jones v. Brandon, 48 Ga. 593; Lessley v. Phipps, 18 Am. Law Reg., N. S., 236; 49 Miss. 790;

Digitized by Google

These decisions, it is true, are not directly applicable to other exemptions; but the principles upon which they are based are so applicable. Exemptions of inconsiderable value may possibly be allowed a retroactive operation. But we think the course of recent adjudications is such as to confirm the following prediction made by Judge Dillon, in the American Law Register for December, 1865: "On examining anew the decisions of the United States supreme court on the subject of the obligation of contracts, from the earliest down to the latest, we are persuaded that that tribunal will deny the validity of exemption laws as to antecedent obligations." [336] The question has been re-examined by that tribunal, in a case involving the validity of a homestead exemption. The constitution of North Carolina, which took effect April 24, 1868, exempted personal property of the value of five hundred dollars, and the homestead and its appurtenances not exceeding one thousand dollars in value. Before that time, the exemptions allowed in that state were "certain enumerated articles of inconsiderable value, and such other property as the freeholders appointed for that purpose might deem necessary for the comfort and support of the debtor's family, not exceeding in value fifty dollars." After the adoption of the constitution, judgment was recovered upon a pre-existing debt, and the question was, whether it might be satisfied out of the debtor's homestead; and the question was answered in the affirmative. The conclusions announced by the court were that to impair is "to make worse; to di-

Martin v. Hughes, 67 N. C. 293; Kibbey v. Jones, 7 Bush, 243. But a homestead law not increasing former exemption is valid. Garrett v. Cheshire, 69 N. C. 396, 12 Am. Rep. 647; Hill v. Kessler, 63 N. C. 437.

[336] Note to Mede v. Hand, 5 Am. Law Reg., N. S., 93.

Digitized by Google

minish in quantity, value, excellence, or strength; to lessen in power, to weaken, to enfeeble; to deteriorate"; that by the constitution a contract is not to be impaired at all; that the impairment "thus denounced must be material"; and that "the remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void." [337] In Mississippi, anterior to the rendition of a judgment, the statute exempted one horse or mule. Subsequently this exemption was increased to two horses or mules. In refusing to give this statute a retrospective operation, the court said: "It may now be considered as firmly settled, here and elsewhere, that any law which materially increases the amount of property withdrawn from liability to the owner's debts impairs the obligation of existing contracts, and is therefore, as to them, unconstitutional. Is an extension of the exemption from one horse to two a material increase in the amount exempted? To a man of wealth it seems inconsiderable; and yet, as to this species of property, it doubles the exemption. To a large class of our population, embracing those most injured as well as those most benefited by exemption laws, the difference between one horse and two is quite material. It is the small farmers and laborers who are most interested in the exemption of two horses rather than one. It is the small trader who will be most injured if the increase is applied to his existing claims. If our present homestead exemption of eighty acres of land should be increased to a hundred and sixty acres, the

[337] Edwards v. Kearzey, 96 U. S. 595.

Digitized by Google

increase would undoubtedly be considered material. But to the homeless and landless who comprise so large a portion of our population, and all of whose wealth consists usually of household furniture and one or more head of cattle or horses, a law which doubles the exemption in this species of property is as important as one which doubles the number of acres to a landholder. These people trade and traffic among themselves, and are creditors as well as debtors. Such a creditor may as well complain of a law which, acting retrospectively, doubles the personal exemption, as the banker or wholesale merchant of one which doubles the homestead."[338] The question whether a statute exempting personal property may be made applicable to pre-existing debts has not, so far as we are aware, been presented to the national courts. The state tribunals refuse to make such an application where the remedy of the plaintiff would thereby be substantially impaired.[339] A statute declaring that the proceeds of all life insurance policies should be exempt from liability for any debt was construed to operate prospectively only. In truth, it was not contended by counsel that the statute could operate against pre-existing debts if policies of insurance were of that tangible character which forbade their transfers by insolvent debtors as against their creditors.[340] Some of the states have incorporated in their constitutions a specific enumeration of property which shall be exempt from execution. There can be no doubt that the exemptions there expressed cannot be restricted.

[338] Johnson v. Fletcher, 54 Miss. 629, 28 Am. Rep. 388. To the same effect are Lessley v. Phipps, 49 Miss. 790; Carlton v. Watts, 82 N. C. 212.

[339] Moore v. Boozier, 42 Ark. 385.

[340] Re Hellbron's Estate, 14 Wash. 536.

Digitized by Google

Whether they can be extended is more questionable. In the only state in which the question seems to have arisen, the decision has been that they cannot.[341]

SECOND.—OF THE PERSONS ENTITLED TO CLAIM THE BENEFIT OF EXEMPTION LAWS.

§ 220. Exemption Laws Apply to All Inhabitants.—Having considered the general principles applicable to the exemption laws, we are now about to treat more particularly of the persons and property to which these laws apply. In considering the persons entitled to the benefit of these laws, we shall first speak of statutes in which no particular persons are designated; and secondly, of statutes in which exemption is given to a specified class of persons. Unless the statute shows a contrary intent, all inhabitants of the state are entitled to the protection afforded by its provisions. Hence, a resident alien is, in this respect, as much favored as a citizen.[342] With respect to nonresidents who may happen to be temporarily in a state where their property is seized under execution, the courts have been unable to agree. On the one side, it is insisted that the exemption laws are designed solely for the benefit of the poor people resident in the state where they are enacted;[343] and on the other side, it is maintained, with at least equal force, that unless the statute is by its terms restricted to permanent residents, the courts have no authority to make such restriction.[344]

[341] Duncan v. Barnett, 11 S. C. 333.

[342] People v. McClay, 2 Neb. 7; Cobbs v. Coleman, 14 Tex. 594.

[343] Lisenbee v. Holt, 1 Sneed, 42; Hawkins v. Pearce, 11 Humph. 44; Finley v. Sly, 44 Ind. 266; Munds v. Cassidey, 98 N. C. 558.

[344] Railroad Co. v. Dougan, 142 Ill. 248, 34 Am. St. Rep. 74; Wright v. Railroad Co., 19 Neb. 175, 56 Am. Rep. 747; Bond v.

Digitized by Google

In those states in which the benefit of the exemption laws is restricted to residents, two questions must frequently arise (1) when does one who, because of his residence in a state was entitled to those benefits, cease to be such a resident so as to forfeit his privilege, and (2) when does one who was formerly a resident of one state so far acquire a residence in another as to become entitled to his exemptions in the latter? One who is domiciled in a state does not, by his temporary absence therefrom, lose the benefit of its exemption laws.[345] The residence of a debtor is not changed from one state to another, so as to deprive him of his exemption rights in the former, by his intention to change, nor by any preparations made by him for the purpose of carrying out such intention. He does not lose his residence in one state until he acquires a residence in another.[346] One who has departed from a state and been continuously absent therefrom for more than a year, retaining an indefinite and indeterminate purpose of returning at some time, "whenever opportunity should offer to better his condition by returning," has become a nonresident in such a sense as debars him from claiming the benefit of its exemption laws as against resident creditors. "Although the question of residence within the meaning of homestead and exemption laws, like that of domicile, depends to a considerable degree upon the question of intent, yet a vague and indefinite intent to return does not constitute that animus revertendi,

Turner (Or.), 54 Pac. 158; Hill v. Loomis, 6 N. H. 263; Lowe v. Stringham, 14 Wis. 222; Abercrombie v. Alderson, 9 Ala. 981; Haskill v. Andros, 4 Vt. 609, 24 Am. Dec. 645. See ante, § 209.

[345] Birdsong v. Tuttle, 52 Ark. 91, 20 Am. St. Rep. 156.

[346] Talmadge's Ad. v. Talmadge, 66 Ala. 199; Bragg v. State, 69 Ala. 204; Caldwell v. Pollak, 91 Ala. 353; Herzfeld v. Beazley, 106 Ala. 447.

Digitized by Google

especially after the lapse of a considerable continuous period of nonresidence, which is necessary to prevent a person from becoming an actual nonresident."[347]

Where a statute creating an exemption purports to confer it upon persons connected with a specified business or to extend it to property kept or used for a designated purpose, as to books and papers used in the abstract business, or to a stock of goods kept by a merchant in his business, the fact that the debtor has absconded from the state, for the purpose of avoiding the payment of his debts, shows the abandonment of his business and that the property is no longer kept for the purposes contemplated by the statute, and that it has become subject to execution.[348]

The courts have not agreed upon the question whether a debtor, to entitle him to an exemption, must be a resident of the state at the time of the levy and the claim of exemption, or at the time of the sale. In Alabama it is insisted that if he is entitled, because of his residence, to an exemption at the time of the levy, he may maintain an action against an officer disregarding his claim, though before the trial the debtor has ceased to reside in the state.[349] In Indiana, on the other hand, one who becomes a bona fide resident of the state between the date of a levy upon his property and that fixed for its sale is entitled to his exemption.[350]

§ 221. Cotenants and Copartners.—It often happens that property designated as exempt by statute belongs to two or more persons either as cotenants or

[347] Stolesbury v. Kirtland, 85 Mo. App. 148.

[348] Miller v. Miller, 97 Mich. 151; Betz v. Bremer, 106 Mich. 87; Orr v. Box, 22 Minn. 487; Spence v. Rambusch, 99 Wis. 676.

[349] McCrary v. Chase, 71 Ala. 540.

[350] Robinson v. Hughes, 117 Ind. 293, 10 Am. St. Rep. 45.

Digitized by Google

copartners. The question then arises whether this property must be treated as exempt to the same extent as if held in severalty. The answers to this question are irreconcilable, and the opposing opinions are both supported by very respectable authorities. On the one hand, it has been insisted that the terms of the exemption statutes are such as to indicate that the legislature proposed to deal only with estates in severalty; that there would be great difficulty, and even impropriety, in setting apart to one cotenant or copartner, to hold as exempt for his sole benefit, property to which he had no claim to any separate possession or enjoyment; and finally, as a result of these and other considerations, that the operation of the exemption laws must be confined to estates in severalty.[351] But, on the other hand, while the right of a partner to the benefit of exemption has been denied, where its allowance was against the consent of his copartners and to the prejudice of the interests of the partnership,[352] yet, where these obstacles did not interpose, cotenants and copartners have been placed on the same footing in a majority of the states, and both have been given the full benefit of the exemption laws. This position, even where the words of the statute do not clearly indicate an intent to deal with undivided interests, is made tenable by the general rule that these statutes must be liberally construed, so as to promote the policy on which they are based, and accomplish the purposes to which they are directed. Prominent among these purposes is the protection of the poor, by allowing them the implements of their trade, and the other means

[351] Bonsal v. Comly, 44 Pa. St. 442; Pond v. Kimball, 101 Mass. 105; Guptil v. McFee, 9 Kan. 30.

[352] Till's Case, 8 Neb. 261; Burns v. Harris, 67 N. C. 140.

Digitized by Google

essential to enable them to gain a livelihood. And where a man is supporting his family by the aid of a team or of tools, or of provisions which he would be entitled to retain if owned by him in severalty, it seems to be a clear perversion of the spirit of the exemption laws to deprive him of a moiety of the property because he is unable to own the whole. Hence, as a general rule, a part interest is, in most of the states, as much exempt from execution as though it were an interest in severalty; and this is true, whether it be held in copartnership or cotenancy, and whether the execution be for the debt of one owner, or for the debt of all the owners.[353] Where an execution is against two or more persons, each is entitled to the benefit of the statute of exemptions to the same extent, as though the writ were against him as a sole defendant;[354] but where a writ was against a husband and wife, it was held that after he had been allowed the benefit of exemption to the extent of his property, she might also claim exemption as to her property, provided that the allowance to both did not, in the aggregate, exceed in value the amount allowed to the husband by law.[355] That the property of a cotenant may be exempt from execution ought not to admit of doubt. If the circumstances are such as would entitle him to exempt the whole chattel were he the owner thereof, they must upon principle be potent to exempt his moiety. The object of the exemption laws was not to exempt estates

[353] Stewart v. Brown, 37 N. Y. 350, 93 Am. Dec. 578; Gilman v. Williams, 7 Wis. 329, 76 Am. Dec. 219; Burns v. Harris, 67 N. C. 140; Gaylord v. Imhoff, 1 Cin. Rep. 404; Howard v. Jones, 50 Ala. 67, referred to in 13 Am. Law Reg. 457; Radcliff v. Wood, 25 Barb. 52; State v. Kenan, 94 N. C. 296.

[354] Spade v. Bruner, 72 Pa. St. 57; 29 Leg. Int. 350.

[355] Crane v. Waggoner, 33 Ind. 83.

Digitized by Google

in severalty merely, but to make some provision for the better maintenance of persons in humble circumstances. If such a person owns but half of a cow or a horse, that half is as much within the letter and the spirit of the exemption laws as the whole would be.[356] Nor is it true that the exemption of this half is any less consistent with the nature of the estate and the rights of the other cotenant than would be its sale under execution. It may happen under an execution against two tenants in common that the interest of one of them is exempt from execution and that of the other not, and hence that a sale of the property, though the writ is against both owners, can transfer an undivided interest only. Thus, if an execution against a husband and wife is levied upon personal property belonging to them as cotenants, but which, as to him, is exempt, because he habitually earns his living by the use thereof, such exemption does not protect from execution her interest, when she does not make such use of it as the statute requires to exempt it from execution.[357] With respect to partnership property, other considerations intervene, and more doubt exists both upon principle and authority. Some of the courts still maintain the right of exemption.[358] "That the several members of a partnership come within the language of the statute and constitution there should be no question, and that they by becoming members of a firm do not place themselves beyond the pale of the reason of the law would seem clear. The same reason which exists for

[356] Newton v. Howe, 29 Wis. 531, 9 Am. Rep. 616; Servanti v. Lusk, 43 Cal. 238; Rutledge v. Rutledge, 8 Baxt. 33; Heckle v. Grew, 125 Ill. 58, 8 Am. St. Rep. 332; Dennis v. Kass, 11 Wash. 353, 48 Am. St. Rep. 880.

[357] Stanton v. French, 83 Cal. 194.

[358] Blanchard v. Paschall, 68 Ga. 32, 45 Am. Rep. 474; Evans v. Bryan, 95 N. C. 174, 59 Am. Rep. 233.

Digitized by Google

protecting an individual engaged in carrying on business would seem to apply with equal force to each and every member of the firm. The whole object of the law is to prevent a person being stripped of all means of carrying on his business, and in this respect no distinction can exist between those who are members of a firm and those who are not."[359] Some of the courts affirming the right of exemption of partnership property enforce such right only against the individual debt of the members of the firm, and exclude therefrom partnership obligations.[360]

In North Carolina and Wisconsin, an exemption will be allowed to one partner if his copartners assent thereto.[361] This is the middle ground between two opposing lines of decision, and, as is usually the case, is less defensible, when logically considered, than either of the extremes between which it lies. For surely the right of exemption was not intended to be dependent on the will of some third person; to exist with respect to some partners, and not to exist with respect to others, as might suit the caprice of the partner whose interests were not involved at all. This remark is inapplicable, however, when the allowance of an exemption in favor of one partner may result in withdrawing property from execution, so as to increase the burden of the other by so diminishing the share of the judgment debtor that it may not be sufficient to meet his

[359] Skinner v. Shannon, 44 Mich. 86, 38 Am. Rep. 232; Chipman v. Kellogg, 60 Mich. 438; McCoy v. Brennan, 61 Mich. 362, 1 Am. St. Rep. 589; St. Louis T. Foundry v. International etc. Co., 74 Tex. 651, 15 Am. St. Rep. 870.

[360] Moyer v. Drummond, 32 S. C. 165, 17 Am. St. Rep. 850; Ex parte Karish, 32 S. C. 437, 17 Am. St. Rep. 865.

[361] O'Gorman v. Fink, 57 Wis. 649, 46 Am. Rep. 58; Russell v. Lennon, 39 Wis. 570, 20 Am. Rep. 60; Scott v. Kenan, 94 N. C. 296; Richardson v. Redd, 118 N. C. 677.

Digitized by Google

proportion of the liabilities of the firm. If the writ is against him only, this result cannot follow, for any levy upon, and sale of, his interest can transfer only what may remain to him after the satisfaction to the firm obligations. But the tendency of the recent decisions to deny altogether the right of exemption out of partnership assets is unquestionable, and we think irresistible.[362] Some of them proceed upon the peculiar language of the statute granting the exemption, as where it seems to contemplate that the exemption must be claimed by the head of a family, or that the property shall be selected by some individual, to be by him held and enjoyed in severalty. We apprehend that the true grounds are, that partnership assets are generally acquired and held for purposes of trade and commerce; that neither partner has any specific interest in the firm assets, but only the right to have the business settled and his share paid to him out of what remains; and that each partner has the right to insist on the application of all the assets, in case of necessity, to the satisfaction of the firm debts. In some of the states statutes have been enacted declaring when and to what extent partnership property shall be exempt from execution. Thus, in Alabama, the statutes de-

[362] Gaylord v. Imhoff, 26 Ohio St. 317, 20 Am. Rep. 762; State v. Spencer, 64 Mo. 355, 27 Am. Rep. 244; White v. Heffner, 30 La. Ann. 1280; In re Handlin, 3 Dill. 290; Gill v. Lattimore, 9 Lea, 381; Wise v. Frey, 7 Neb. 134, 29 Am. Rep. 380; Baker v. Sheehan, 29 Minn. 235; Spiro v. Paxton, 3 Lea, 75, 31 Am. Rep. 630; State v. Bowden, 18 Fla. 17; Short v. McGruder, 22 Fed. Rep. 46; Giovanni v. First N. B., 55 Ala. 305, 28 Am. Rep. 723; Love v. Blair, 72 Ind. 281; Aiken v. Steiner, 98 Ala. 355, 39 Am. St. Rep. 58; Porch v. Arkansas M. Co., 65 Ark. 40; Cowen v. Creditors, 77 Cal. 403, 11 Am. St. Rep. 294; McCrimmon v. Linton, 4 Colo. App. 426; Fingerhuth v. Lachman, 37 Ill. App. 489; Wills v. Downs, 38 Ill. App. 269; Green v. Taylor, 98 Ky. 330, 56 Am. St. Rep. 375; Thurlow v. Warren, 82 Me. 164, 17 Am. St. Rep. 472; State v. Pruitt, 65 Mo. App. 154.

Digitized by Google

clare that the exemption shall not exist as against either of the copartners nor against the firm creditors,[363] while in North Dakota and South Dakota a firm is allowed an exemption of a specific amount, but a several exemption is not conceded to each partner.

In those states wherein no exemption can be obtained out of partnership property the question must frequently arise, whether, on the dissolution of the partnership without the discharge of its obligations, the property which belonged to it continues subject to execution, though claimed as exempt. In Wisconsin it has been said that, even after a levy upon partnership assets, the partners were entitled to a reasonable time within which to sever their partnership interests, and thereupon to claim their exemptions.[364] It should be remembered that in this state a partner is entitled, even during the continuance of the partnership, to an exemption in the property thereof, with the consent of his copartners. If one of the partners transfers to the other all of his interest in the firm property, so that the latter becomes the owner thereof in severalty, he is entitled, if the transfer was made in good faith, to the same exemptions therein as if it had always been his separate property.[365] If, at the time of the transfer, the partnership was insolvent, it has been held, in one state, that the transfer must be adjudged, as a matter of law, to have been intended to defraud the firm creditors, and hence that it cannot be enforced against them, and therefore that the transferee has no right of exemption therein.[366] We think, however, the better opinion is, that the dissolution of a partnership or the

[363] Code Ala., § 2513.
[364] Ladwig v. Williams, 87 Wis. 615.
[365] Levy v. Williams, 79 Ala. 171.
[366] Aiken v. Steiner, 98 Ala. 355, 39 Am. St. Rep. 58.

Digitized by Google

transfer of all the property thereof to one partner, even though with a view to entitle him or both of the partners to the privilege of the exemption laws, does not constitute a fraud upon their separate creditors or the creditors of the firm, and hence that, whenever the partnership relations cease, so that the legal title to the property is vested in the partners as tenants in common, or wholly in one as the transferee of the others, the right to hold such property as exempt from execution attaches, if it is of such a character that it might have been exempt had it never been partnership assets.[367]

§ 222. Head of a Family.—In many of the states, homestead and other exemptions are allowed to the "heads of families"; and the courts have frequently been required to discuss and decide the question, Who is entitled to the benefit of this exemption? In the dictionaries, a family is defined as being "the collective body of persons who live in one house, and under one head or manager; a household, including parents, children, and servants, and, as the case may be, lodgers or boarders."[368] But it is evident, from the decisions, that the word "family" has, in the exemption statutes, a signification somewhat different from that attributed to it in the dictionaries. In the first place, it is by no means essential that persons, to constitute a family, should reside in the same house. Thus, a man who has either a wife or a child dependent on him for support

[367] Bates v. Callender, 3 Dak. 256; Goudy v. Werbe, 117 Ind. 154; Dennis v. Kass, 11 Wash. 353.

[368] Webster's Dictionary; Parsons v. Livingston, 11 Iowa, 104; Zimmerman v. Franke, 34 Kan. 654; Arnold v. Waltz, 53 Iowa, 707, 36 Am. Rep. 248.

Digitized by Google

is the head of a family,[369] although he does not reside under the same roof with them.[370] This rule would probably not be applied where the separation of the members of the family is permanent in its character; nor where the head of the family resides in one state, and the other members of the family in another.[371] A husband does not cease to be the head of a family while his wife and childen are temporarily absent from the state.[372] But if he does not live with his wife for a number of years, and has no children, he is not the head of a family.[373] If he has minor children, however, whom he assists in supporting, or to whom he owes the duty of support, he remains the head of a family within the meaning of the exemption laws, whether he resides with them or not. Thus, if he has been divorced, and the custody of the children of the marriage awarded to the wife, and they continue in her charge, still if he contributes toward their support, he is entitled to his exemptions as the head of a family,[374] and the fact that the husband and father lives apart from his wife and children, has contributed nothing to their support for a long time, and generally has disregarded his obligations to them, does not deprive him of his character of the head of a family so as to forfeit his right of exemption.[375]

In the second place, it is quite possible for several persons to reside together in the same house, under

[369] Barney v. Leeds, 51 N. H. 253; Cox v. Stafford, 14 How. Pr. 519.

[370] Seaton v. Marshall, 6 Bush, 429, 99 Am. Dec. 683; Robinson's Case, 3 Abb. Pr. 466; Sallee v. Waters, 17 Ala. 482.

[371] Allen v. Manasse, 4 Ala. 554; Abercrombie v. Alderson, 9 Ala. 961; Boykin v. Edwards, 21 Ala. 261; Keiffer v. Barney, 31 Ala. 192.

[372] State v. Finn, 8 Mo. App. 261.

[373] Linton v. Crosby, 56 Iowa, 386, 41 Am. Rep. 107.

[374] Roberts v. Moudy, 30 Neb. 683, 27 Am. St. Rep. 426.

[375] Rogers v. Fox (Tex. App.), 16 S. W. 781.

Digitized by Google

one head or manager, without constituting a family within the meaning of the exemption statutes. This may happen where a man, having no wife nor children, lives in a house with his servants or other employés. Thus, where an unmarried man employed his brother and his brother's wife to live with him and take care of his house, he was held not, on that account, to be the head of a family. In this case the court said: "The head of a family primarily is the husband or father. One may be such head, however, without being either. Thus, the mother may become such on the death of her husband. So a son having mother and brother and sisters, or either, depending upon him for support, and living in a household which he controls, might be such head. And thus we might state many cases where the party claiming the exemption would be legally entitled to it, and still not be the husband or father. And yet in each case he must, for the purposes of this inquiry, stand in the place of the father. He must be the master in law of the family. In the case before us, the married brother and his wife in no proper sense belong to the family of the plaintiff. He had no control over them, except such as resulted purely and exclusively from contract. He had no right to exact obedience from them, or to direct their movements, except so far as their agreement bound them to take care of the house." [376] Where two or more persons are residing together, one of whom owes the duty of support and protection to the others; and they, on their part, are dependent on him and owe him the duty of obedience, and these correlative duties arise out of the status of the parties, and not out of a contract between them, other than the contract of marriage,

[376] Whalen v. Cadman, 11 Iowa, 226.

Digitized by Google

there is undoubtedly a family. Hence, a husband and wife, if living together as such, though without children, servants, or other dependents, constitute a family.[377] If the persons living in the same house owe these duties to one another because of some contract relation, as where one is master and the others servants or employés, they do not constitute a family.[378]

But it is by no means necessary that the relation of husband and wife, or parent and child, should exist in every case to constitute a family. One who has living with him, and dependent on him for support, his mother, or brother, or sisters, is the head of a family, and, as such, entitled to the benefit of the exemption laws.[379] That a son is the head of a family when his mother is living with him and dependent on him for support is unquestionable, for he owes her this duty.[380] But, in many instances, persons live in the same house, looking to its master for support and protection, which he affords to them, though under no legal obligation to

[377] Kitchell v. Burgwin, 21 Ill. 45; Cox v. Stafford, 14 How. Pr. 519; Brown v. Brown, 68 Mo. 388.

[378] Whaley v. Whaley, 50 Mo. 577; Whithead v. Nickleson, 48 Tex. 530; Calhoun v. McLendon, 42 Ga. 405; Calhoun v. Williams, 32 Gratt. 18, 34 Am. Rep. 759.

[379] Parsons v. Livingston, 11 Iowa, 104, 77 Am. Dec. 135; Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584; McMurray v. Shuck, 6 Bush. 111, 99 Am. Dec. 662; Marsh v. Lazenby, 41 Ga. 153; Connaughton v. Sands, 32 Wis. 387.

[380] State v. Kane, 42 Mo. App. 253. In Ohio, where an exemption is allowed in favor of one who has a family, it was held that a debtor residing with his widowed mother and invalid brother, who were supported by him, did not fall within the protection of the statute. It is not clear from the opinion of the court whether it regarded such a person as not the head of a family, or whether it gave a peculiar and restricted signification to the words "has a family," and construed them to include those only who had relatives dependent upon them, or whom they were under obligation to support. Riley v. Hitzler, 49 Ohio St. 651.

Digitized by Google

do so. In Georgia, such a person is not the head of a family within the meaning of the homestead laws. In that state, the applicant for a homestead, to which only a head of a family was entitled, alleged that "he was the head of a family consisting of his sister, a widow about thirty-eight years old, and her three children, aged seventeen, fifteen, and seven years old, respectively, who are indigent and mainly dependent on petitioner for support." A demurrer to the petition was sustained on the following grounds: "The applicant was under no legal obligation to support the persons whom he claimed to be his family, and, therefore, he was not entitled to a homestead as the head of a family. If the applicant could obtain a homestead as the head of a family of persons whom he was not legally bound to support, then he might enjoy it for his own benefit exclusively, and refuse with impunity to support those for whose benefit he claimed to have obtained it." [381] But this is an isolated case, and deserves so to remain. It seems to us inconsistent with a subsequent decision in the same state, which, however, does not overrule nor even allude to it.[382] It is not essential that the head of a family be under a legal obligation to support its dependent members. The ties of consanguinity may be sufficient to cause him to assume the obligation, where the law does not require him to do so. Hence, if he takes charge of the children of a deceased brother or sister, providing for them a home, and standing, by his voluntary act, in the relation of parent toward them, he and they constitute a family.[383] Where the persons residing together under

[381] Dendy v. Gamble, 64 Ga. 528.
[382] Holloway v. Holloway, 86 Ga. 576, 22 Am. St. Rep. 484.
[383] Arnold v. Waltz, 53 Iowa, 706, 36 Am. Rep. 248.

Digitized by Google

one roof are relatives, recognizing one person as the head or master of the house, the tendency of the recent decisions is to treat him as the head of a family, though such persons are not minors nor dependent on him for support. "The relations existing between such persons must be of a permanent and domestic character, not abiding together temporarily as strangers. There need not, of necessity, be dependence or obligation growing out of the relation."[384] Doubtless, the duty which one assumes, even to dependent and helpless persons, cannot make him the head of a family, where such assumption is capricious or entirely voluntary; but, on the other hand, there need not be a legal duty. It may be wholly moral. Thus, a stepfather or stepmother is without any legal obligation to support his or her stepchildren after the death of their mother or father. Yet he or she cannot be regarded as a volunteer in undertaking such support, and, if it is undertaken, and they are minors, he or she who thus provides and cares for them is entitled to the benefit of the exemption laws as the head of a family.[385]

One having a wife in whose favor a judgment has been obtained for alimony cannot, by undertaking to support his sister and widowed mother, acquire the character of a head of a family, and become entitled as such to claim an exemption from the judgment thus entered in favor of his wife.[386]

Widowers and widows have been held to be heads of families when the persons residing with them were not dependent upon them, and did not owe any duty

[384] Tyson v. Reynolds, 52 Iowa, 431; Duncan v. Frank, 8 Mo. App. 286.

[385] Holloway v. Holloway, 86 Ga. 576, 22 Am. St. Rep. 484; Capek v. Kropik, 129 Ill. 509.

[386] Spengler v. Kaufman, 43 Mo. App. 644.

Digitized by Google

to them other than that resulting from a contract of employment. Thus, in Nebraska, a widower who was residing on his homestead with a married son, the son's wife, and the wife and children of another married son, then absent at the mines, was adjudged to be entitled to retain such homestead as the head of a family; but this was on the ground that, as the homestead existed while its owner was a married man, "neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law."[387] In other states, where a family has existed consisting of a husband and wife, and, after his death, she continued to maintain a family establishment consisting of herself and servants, she has been held to be the head of a family.[388] These decisions may be regarded as forced from the courts by the manifest injustice and even cruelty of depriving a wife of the protection of the exemption laws, because death has robbed her of the protection and support of her husband. Nevertheless, these circumstances of hardship do not change the signification of the word "family." Servants do not constitute a part of a family. Therefore, their employment by a widow does not make her the head of a family.[389] If the law were otherwise, a widow of sufficient pecuniary ability to hire and support servants would be entitled to exemption rights as the head of a family, and would lose those rights when the decadence of her fortune made

[387] Dorrington v. Myers, 11 Neb. 389.

[388] Collier v. Latimer, 8 Baxt. 420, 35 Am. Rep. 711; Race v. Oldridge, 90 Ill. 250, 32 Am. Rep. 27.

[389] Murdock v. Dalby, 13 Mo. App. 41; Kidd v. Lester, 46 Ga. 231; Emerson v. Leonard, 96 Iowa, 311, 59 Am. St. Rep. 372.

Digitized by Google

it impossible longer to incur such an expenditure.

As between husband and wife, he must ordinarily be regarded as the head of a family. But if the wife becomes in fact the head of the family, she is entitled to exemption privileges belonging to that position. The reasons for her separation from her husband will not be considered. Whether he abandons her against her wish, or they separate by mutual consent, is immaterial. The material facts in respect to her right to be treated as the head of a family are that she is living separate and apart from her husband, having the charge of her minor children or others dependent on her for support, who are living with her in the family relation, and looking to her as their head. If these facts exist, she is the head of a family.[390] The courts are, we think, justified, for the purpose of interpreting a statute, in considering its manifest object as well as its express language. Legislatures, in creating exemptions in favor of heads of families, have not done so solely or principally for the purpose of granting a privilege to such head, but mainly that, through him or her, the dependent members of the family may be rescued from want and assisted in retaining the common necessities of life enumerated in the statute. In those cases in which the husband and father has abandoned his family, or otherwise abdicated his position as its head, and the wife and mother has substantially taken his place, the courts agree that she has become de facto the head of the family, and entitled as such to claim and enforce exemption rights, whether the property at-

[390] Nash v. Norment, 5 Mo. App. 545; State v. Slater, 22 Mo. 464; Kenley v. Hudleson, 99 Ill. 500, 39 Am. Rep. 31; People v. Stitt, 7 Ill. App. 298; Partee v. Stewart, 50 Miss. 717; Fish v. Street, 27 Kan. 270.

Digitized by Google

tempted to be levied upon belongs to him or to her.[391] Though the husband and father is not intentionally derelict, but remains faithful to, and under the same roof with, his wife and family, he may, either through disease or other incapacity, be unable to support her, and she, from her superior ability as a breadwinner, or from being possessed of separate estate, may become the one on whose efforts or property the family must rely for support. Can an execution against her be levied upon property which she would be entitled to hold as exempt if her husband had deserted or otherwise abandoned her and their family? Whether, under these circumstances, she is, strictly speaking, the head of a family or not, she is within the spirit of the law allowing exemptions to heads of families.[392]

[391] Berry v. Hanks, 28 Ill. App. 51; Freehling v. Bresnahan, 61 Mich. 540, 1 Am. St. Rep. 617; Hamilton v. Fleming, 26 Neb. 240.

[392] Johnson v. Little, 90 Ga. 781; Sparks v. Shelnutt, 99 Ga. 629; Temple v. Freed, 21 Ill. App. 238; Wilson v. Wilson (Ky.), 42 S. W. 404; Boelter v. Klossner (Minn.), 77 N. W. 4; State v. Houck, 32 Neb. 525; Linander v. Lonstaff, 7 S. D. 157. "The law places the husband primarily at the head of the family, because the Creator, in his infinite wisdom, endowed man with superior physical strength; but when, from infirmity, misfortune, or dissipation, he is no longer able to provide for himself and family, and the responsibility is shifted to the shoulders of the wife, the legislature has not deprived her of the exemption right, and at the same time imposed the responsibility of supporting her husband and maintaining the home and family. The evidence in this case, which is practically undisputed, sufficiently shows that the plaintiff had saved from her earnings as a midwife five hundred dollars, with which she purchased the stock of boots and shoes levied upon by the defendant sheriff, and at the time of the seizure and for about four years prior thereto, had been engaged in retail trade; that her husband was without means, and afflicted with an incurable disease, which had for some years rendered him unable to perform manual labor or successfully attend to business; that the plaintiff had supported the children of which the family was composed and her husband out of the moneys obtained from the business in which she engaged: and the boots and shoes, valued at seven hundred dollars, scheduled and claimed

Digitized by Google

One who is the head of a family does not cease to be so by living in a house controlled by some other person. Hence, when a widow and her children go to live with her father, she does not lose the benefit of her exemption as the "head of a family."[393] One who becomes the head of a family after the issue and before the levy of an execution is, in Alabama, entitled to avail himself of the exemption law.[394] Upon the decease of the husband, the widow, who thereby becomes charged with the care and maintenance of the children, succeeds him as the head of the family. The exemption laws were designed for the benefit of the family, rather more than for the benefit of its head. On his death, property before held by him as exempt from execution retains its exempt character in favor of his widow, who succeeds to his exemption rights as a householder or head of the family.[395]

§ 223. **Householders.**—The term "householder" is very nearly synonymous with the phrase "head of a family." According to Webster, the lexicographer, a householder is "the master or chief of a family; one

by her as exempt, were all the property which she attempted to withhold from creditors. It is clear from an examination of all the statutory provisions relating to the subject of exemptions that the legislature did not intend to confer upon the head of the family, apart from the family itself, any individual consideration or benefit; but the statute is designed to protect the family, and when the husband has ceased to be the head of the family, either by death, abandonment, or infirmity, and the wife, by reason thereof, has of necessity assumed as a matter of fact that responsible relation, the law, recognizing existing conditions, allows her, as the head of the family, to claim the exemptions withheld from the invasion of judicial encroachment."

[393] Bachman v. Crawford, 3 Humph. 213, 39 Am. Dec. 163.

[394] Watson v. Simpson, 5 Ala. 233.

[395] Becker v. Becker, 47 Barb. 497.

Digitized by Google

who keeps house with his family."[396] This definition, if applied by the courts, would necessarily deprive all persons of exemptions as householders unless they have families, or, in other words, persons dependent upon them for support, for whom they are under some moral, if not legal, obligation to provide, and the decisions already referred to defining heads of families must be equally applicable in determining who are householders. To this extent some of the decisions undoubtedly go, and hence they deny the right of exemption to unmarried persons, though they in fact keep house, or live in houses of their own, if they do not contribute to the support of any other person or have no one living with, or dependent upon, them. The exemption does not depend upon one having a house whether as his own or as a tenant, but upon his having a household.[397] "Our view is that the term 'householder' means a person who has a family, which he keeps together and provides for, and of which he is the head or master. He need be neither a father nor a husband, but he must occupy the position toward others of head or chief of a domestic establishment."[398]

[396] Bowne v. Witt, 19 Wend. 475. "A householder may be said to be a person owning or holding and occupying a house; and a family may be defined to be a collection of persons living together under one head. A householder, having a family, may be characterized as the head of a family occupying a house, and living together in one domestic establishment. He need not be a husband or a father, nor need the family over which he has headship and control be kept together as a unit continuously. The education of children, the illness of any member of the family requiring change of climate, or mere absence, however protracted, if only temporary, for pleasure or recreation,, will not of course, dissolve the family relationship or break up the household." Pearson v. Miller, 71 Miss. 379, 42 Am. St. Rep. 470.

[397] Peterson v. Bingham, 18 Wash. 178.

[398] Nelson v. State, 57 Miss. 286, 34 Am. Rep. 444; Brown v. State, 57 Miss. 424.

Digitized by Google

To entitle a person to exemption as a householder, it is by no means essential that he should be living with his family, nor that they should be occupying a house. Thus, in New York, one Murray absconded to avoid his creditors. His family had commenced to move from their former residence to the house of his wife's father. While en route, their only cow was seized under execution. The plaintiff in execution claimed that, under the circumstances, Murray was not a householder at the time of the levy of the writ; but the court said: "Murray had gone to Ohio, leaving his wife and children living together as a family. They were his household, and he was their householder. To say that a family, while in act of removal, and on the highway, may be deprived of their bed and their cow, on execution, because they did not for the time inhabit a dwelling-house, would be a perversion of the statute. So long as they remain together as a family, without being broken up and incorporated into other families, the privilege remains. It was designed as a protection for poor and destitute families; and the forlorn and houseless condition of this family, in the absence of the husband and father, gave them a peculiar claim to the benefit of the statute."[899] Though a statute restricts the right of exemption to a householder having a family, it is not essential that any of its other members reside with him in the state or country where the exemption is claimed, if the other members are dependent upon him for support, or are supported by him. "The term 'householder' sometimes covers the case of a man without a family or wife or children, who keeps up a

[899] Woodward v. Murray, 18 Johns. 400. The absconding of the husband does not forfeit the right of the family to exemption. Bonnel v. Dunn, 5 Dutch. 435.

Digitized by Google

house, but it also embraces usually the head of an actual family dependent upon him, whether he is housekeeping or not." [400] It may be that in some states, one who packs up his goods, intending to remove to another state, loses his right to exemption as a householder.[401] But it is quite certain that one who is removing from one part of a state to another part,[402] or who temporarily ceases keeping house, and, therefore, stores his goods,[403] or who, on account of domestic or other difficulty, temporarily abandons his family,[404] is still entitled to exemption as a householder. In Kentucky, an exemption exists in favor of bona fide housekeepers having a family residing within the state. If such a housekeeper has determined to remove from the state, and his family has already gone, he still remaining for business reasons, but intending soon to follow them, has not lost or forfeited his right of exemption.[405] Where the statute requires a householder to be a resident, his absence from the state may terminate his right of exemption, though it is not intended to be permanent, if both he and his family have gone into another state, where they reside together. It is true he has not lost his residence, but he has ceased to be a householder, except in the state to which he has taken his family, and wherein he has his household, and if entitled to an exemption as householder, it must be in the latter state.[406]

[400] Pettit v. Muskegon B. Co., 74 Mich. 214.

[401] Anthony v. Wade, 1 Bush, 110.

[402] Mark v. State, 15 Ind. 98; Davis v. Allen, 11 Ala. 164; Pool v. Reid, 15 Ala. 826; O'Donnell v. Segar, 25 Mich. 367.

[403] Griffin v. Sutherland, 14 Barb. 456.

[404] Carrington v. Herrin, 4 Bush, 624; Norman v. Bellman, 16 Ind. 156.

[405] Stirman v. Smith (Ky.), 10 S. W. 131.

[406] Ross v. Banta (Ind.), 34 N. E. 865.

Digitized by Google

The keeping, occupying, and controlling a house may perhaps sometimes entitle a person to be treated as a householder when the other facts do not warrant it. This is unquestionably true in Indiana. A widower is a householder in that state if he keeps house, though his children are grown, and have left him without any dependents, nor any household other than his employés or servants.[407] Nor is a bachelor there denied the privileges of a householder if he keeps house with servants, though he has no dependents nor relatives residing with him.[408] While mere housekeeping, or the maintenance and management of a household of servants or employés, may possibly entitle one to the title and privileges of a householder, it is quite clear that the absence of housekeeping will not necessarily deprive one of the title of householder. It may be that some householders are not heads of families, but all heads of families are householders. If one is the head of a family, to whose support he contributes, he is a householder, though he has no house of his own, and lodges and boards in the house of another person whom he pays therefor.[409] A married woman who continues to provide for the children of a prior marriage may claim exemption as a householder.[410] So, also, may a father, with whom reside as one family his indigent daughter

[407] Bunnell v. Hay, 73 Ind. 452. This rule is repudiated in Kentucky and Mississippi. Carter v. Adams (Ky.), 4 S. W. 36; Hill v. Franklin, 54 Miss. 632; Powers v. Sample, 72 Miss. 187.

[408] Kelley v. McFadden, 80 Ind. 536.

[409] Lowry v. McAlister, 86 Ind. 543; Astley v. Capron, 89 Ind. 167. This rule probably does not prevail where the head of the family has come from another state, and occupies a room here at the sufferance of another, as a mere visitor or guest. In such case he is neither a resident nor the head of a family. Velle v. Koch, 27 Ill. 129.

[410] Brigham v. Bush, 33 Barb. 596.

Digitized by Google

and her children.[411] To constitute a householder, it is not necessary that the relation of husband and wife, or of parent and child, should exist. A man living with his sister, they jointly contributing to their support, is a householder;[412] and so is a man who rents a house, hires servants, and keeps boarders.[413] The bad character of a defendant cannot deprive him of his exemption rights. Hence, if a prostitute "really had a family which she was bound to provide for, the fact of her improper mode of living would not deprive her of a right to which she was otherwise entitled."[414] The same rule prevails in the case of an unmarried man and woman, and their children living with them as a family. The family exists in fact, if not in law; and there is at least a moral obligation on the part of the man to care for his illegitimate issue.[415]

§ 224. Teamster—Agriculturist.—"In common speech, a teamster is one who drives a team; but in the sense of the statute, every one who drives a team is not necessarily a teamster, nor is he necessarily not a teamster unless he drives a team continually. In the sense of the statute, one is a teamster who is engaged, with his own team or teams, in the business of teaming—that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business of

411 Blackwell v. Broughton, 56 Ga. 390.
412 Graham v. Crockett, 18 Ind. 119.
413 Hutchinson v. Chamberlain, 11 N. Y. Leg. Obs. 248; Van Vechten v. Hall, 14 How. Pr. 436.
414 Bowman v. Quackenboss, 3 Code R. 17.
415 Bell v. Keach, 80 Ky. 42.

Digitized by Google

teaming habitually, and for the purpose of making a living by that business. If a carpenter, or other mechanic, who occupies his time in labor at his trade, purchases a team or teams, and also carries on the business of teaming by the employment of others, he does not thereby become a teamster in the sense of the statute. So of the miner, farmer, doctor, and minister." [416] A teamster may, if his capital or credit is sufficient, own several teams, and may employ others to attend to the manual labor. He need not personally drive either of the teams. It is sufficient that his business is that of teaming. If he "owns more than one team, that is, if he owns more than two horses or mules, and their necessary harness and equipments, and more than one wagon, it is his right and privilege under the law to select and designate two animals and their harness, et cetera, and one wagon, suitable for use therewith, or with two animals, as his exempt property, and, when so selected and pointed out, the law will recognize and protect them as his exempt property, provided they were actually in use by such teamster in his business of teaming, by which he earned his living at the time of the levy by an officer; and such selection may be made without regard to the value or quality of the property selected." [417] Under the statute of California, it is essential that the person claiming exemption as a teamster "habitually earn his living by the use of his team." [418] Therefore, the fact that the claimant is engaged in another business, as where he is a dealer in

[416] Brusie v. Griffith, 34 Cal. 302, 91 Am. Dec. 695. Contracting to do work which will require the team to be used outside of the state does not affect the teamster's right of exemption. Whicher v. Long, 11 Iowa, 48.

[417] Elder v. Williams, 16 Nev. 420.

[418] Code Civ. Proc., sec. 690; Murphy v. Harris, 77 Cal. 194.

Digitized by Google

coal, and uses his team in hauling coal to his place of business and in delivering it to customers, is fatal to his claim.[419] If, however, he is engaged in no other business, he does not lose his right to exemption as a teamster or hackman, by turning his horses temporarily out at pasture and sending his hack to the shop for repairs.[420] Though a statute creates an exemption of a team in favor of a teamster, by the use of which he habitually earns his living, it is not essential to his right of exemption that he be engaged in no other business, or that he earn his living solely by the use of the team. Thus, where a defendant earned his living by retailing oils, which he hauled from place to place, for the purpose of delivery, by his team, and the business was of such a character that without the use of the team it could not have been carried on, it was held that his team was exempt if its use was necessary to his occupation, and, "if the occupation supplies his living, he earns his living by the use of his team. . . . . The fact that the laborer utilizes his efforts in the way of an independent, rather than a dependent, business, should not operate to his disadvantage. This is the situation of the defendant. If he employed another to do the work of receiving the oils, replenishing the tank, and delivering about the city, the employé would, without question, be a laborer."[421] This case is an extreme one, and the conclusion reached not free from doubt. It is clear that the business of the defendant was that of a dealer in and retailer of oils. It is true that in this business it was necessary to use a team, and that

[419] Dove v. Nunan, 62 Cal. 400.

[420] Forsyth v. Bower, 54 Cal. 639.

[421] Consolidated Tank Line Co. v. Hunt, 83 Iowa, 6, 32 Am. St. Rep. 285.

Digitized by Google

without the use of one the business could not be carried on with success. This is an incident of many businesses of a mercantile character, in which the articles sold are bulky or heavy and the custom of the trade is to deliver them to the purchasers. Nevertheless, we think the persons conducting such businesses are not teamsters, and that they do not habitually earn their living by the use of a team. We, however, concede that a teamster or peddler need not devote his whole time to teaming or peddling to entitle him to retain as exempt the team used in his business. "Habitual" means customarily, or by frequent practice or use; it does not mean exclusively or entirely, and if one claims a team as necessary to his business of peddling, it is not fatal to such claim that he "may have, to a limited extent, applied his team to other uses, or that some portion of his living, however slight that portion, may have come from some other avenue of industry."[422] Some exemptions are allowed by statute only to persons engaged in agriculture, or "in the science of agriculture." An agriculturist is a husbandman; one engaged in the tillage of the ground, the raising, managing, and fattening of livestock, or the management of a dairy. The question most difficult of solution is not with respect to the character, but to the amount of business required to constitute an agriculturist. If a man is engaged in another business, and merely cultivates a small tract of land adjacent to his dwelling, it seems clear that he is not engaged in agriculture.[423] On the other hand, where it appeared that the claimant farmed about forty-five acres of land, raising buckwheat, potatoes, corn, oats and some wheat, he was held

[422] Stanton v. French, 91 Cal. 274, 25 Am. St. Rep. 174.
[423] Simons v. Lovell, 7 Heisk. 510.

Digitized by Google

to be one "engaged in the science of agriculture," though he lived at another place, at which he kept a boarding-house, and sometimes worked as a tailor. The views of the court were as follows: "A person is 'actually engaged in the science of agriculture' when he derives the support of himself and family, in whole or in part, from the tillage and cultivation of fields. He must cultivate something more than a garden, though it may be much less than a farm. If the area cultivated can be called a field, it is agriculture, as well in contemplation of law as in the etymology of the word. And if this condition be fulfilled, the uniting of any other business, not inconsistent with the pursuit of agriculture, does not take away the protection of the act. The keeping a tavern and boarding-house, and the working at his trade as a tailor, in the intervals of the seasons for farming, did not divest Lewis of the benefits which the statute was intended to secure to him. The act extends its protection over the property of the agriculturist during the winter, when he is obliged to suspend his labors in the field, as effectually as in the summer, while actively engaged in rearing or harvesting crops."[424] One who is a farmer is entitled to exemption as such, though he owns no farm and has none leased, if he has not abandoned the business of farming.[425] The rule is otherwise if he has not been in the business of farming. The exemption of any article implies that it is exempted for the use of the judgment debtor in his business. Hence, if it be appropriate to a particular trade or business in which the debtor has not been engaged, and he has it on hand as a merchant, or for the purpose of sale, it is not exempt. There-

[424] Springer v. Lewis, 22 Pa. St. 193.
[425] Hickman v. Cruise, 72 Iowa, 528, 2 Am. St. Rep. 256.

Digitized by Google

fore, a merchant having plows or harness for sale as a part of his stock of trade, and who neither owns nor leases farming property, cannot retain them as exempt from execution. "The statute of exemption is to be construed with reference to the situation and vocation of the owners of property. A merchant cannot claim such implements to be exempt, any more than he could a boat which he had no occasion to use as a fisherman, or corn or grain for himself and family, when he was unmarried, and had no family, and was a boarder, or hay for cows and sheep when he had neither. The evident object of the statute is that, not that any one may own and claim to be exempted all the various kinds of chattels therein enumerated, but that persons should not be deprived of the simple means by which they gained a livelihood in their respective vocations."[426] Though a person is engaged in business in which, if necessary, he might hold a horse and buggy as exempt, yet he is not entitled to so hold if he acquired them for speculative purposes only, and they are not used in, nor necessary to, his business.[427]

§ 225. A Person may Exercise Two Trades; as, when he obtains his livelihood from a farm, and also from a workshop. In this case the question arising is, whether he shall be allowed exemption as a farmer or as a mechanic, or as both. In Michigan, the question is answered by a statute allowing exemption in the business in which the debtor is principally engaged.[428] He is deemed to be principally engaged in that business to

[426] Files v. Stevens, 84 Me. 84, 30 Am. St. Rep. 338.

[427] Boyle v. Walsh, 105 Mich. 237.

[428] Morrill v. Seymour, 8 Mich. 64; Kenyon v. Baker, 16 Mich. 373. 97 Am. Dec. 158; Colville v. Bentley, 76 Mich. 248, 15 Am. St. Rep. 312; Boyle v. Walsh, 105 Mich. 237.

Digitized by Google

which he devotes the most time, although it may yield less profit than some of his other occupations.[429] Where the statute is not so specific as that of Michigan, it has been held that the debtor cannot, by multiplying his employments, "claim cumulatively several exemptions, created by statute for several distinct employments. Thus, one person cannot claim the exemption of his library and office furniture as a professional man, and at the same time have exempted to him tools and implements for the purpose of carrying on his trade or business as a mechanic or miner. The mere fact, however, that a debtor carries on two or more trades or professions at the same time does not deprive him of all exemptions. If he has two separate pursuits, the exempted articles must belong to him in his main or principal business. In other words, to the business in which he is principally engaged." [430] In another case it was said that the debtor has the right to elect under which trade he will claim.[431] An agriculturist may employ a portion of his time in some other business without losing his right of exemption as an agriculturist.[432] He may also use his exempt property by hiring it to others or by using it for the purpose of doing work for them. Hence, if it is an outfit for threshing grain, he may employ it in threshing crops of other farmers as well as his own.[433] If a man is engaged in the business of editing and publishing a newspaper, carrying on a job printing office, also in the loan, land, and insurance business, and is also a jus-

[429] Smalley v. Masten, 8 Mich. 529, 77 Am. Dec. 467.

[430] Jenkins v. McNall, 27 Kan. 582, 41 Am. Rep. 422; Bevitt v. Crandall, 19 Wis. 581.

[431] Lockwood v. Younglove, 27 Barb. 505.

[432] Springer v. Lewis, 22 Pa. St. 191.

[433] Spence v. Smith, 121 Cal. 536.

Digitized by Google

tice of the peace, he is entitled to hold as exempt his printing press and type used in printing his newspaper if that is his principal business.[434] In many states, exemptions are allowed to all persons, or to all heads of families, and additional exemptions are provided for persons filling certain trades. In such cases, while a man cannot claim exemption for more than one trade or calling, he may have the exemption provided for heads of families, and also the exemption allowed to persons of his calling.[435] The rule that one engaged in distinct and diverse callings cannot cumulate exemptions on account thereof meets with general concurrence. But if the different callings are of the same nature, as where they both require the use of mechanical tools, the application of the rule has been frequently denied.[436] Thus, in Massachusetts, where it was claimed that a man could not have allowed him, as exempt, stock in trade as a painter, and also as a carriage maker, the court denied the claim, saying: "There is no settled rule of division or distinction between different trades in this country, and changes are in constant progress, by which the divisions of labor and trade are multiplying, especially in large towns, where business is prosecuted on a large scale. The business of house-building, for example, is divided into a great number of separate trades; and, if the distinction contended for here were to be adopted, the tools of a joiner used in making windows would not be exempted if he was also engaged in making stairs, and possessed tools adapted to that business. This view of the statute was taken in Pierce v. Gray, 7 Gray, 67,

[434] Bliss v. Vedder, 34 Kan. 57, 55 Am. Rep. 237.
[435] Harrison v. Martin, 7 Mo. 286.
[436] Stewart v. Welton, 32 Mich. 56.

Digitized by Google

where it was held that one whose general business was the ice business, and whose tools of trade in that business were exempt, might also hold as exempt his tools for farming or gardening."[437] Indeed, the case of Pierce v. Gray, here referred to, seems to be wholly irreconcilable with the rule. But in that case the principal business of the defendant was the ice business. The only articles held to be exempt which were not used in that business were a shovel, pickax, and a dung-fork, with which defendant was accustomed to work in the summer time in and about his garden and stable. Without adverting to the debtor's dual occupation, if merely attending to his stable and garden can be called an occupation, the court said: "In the country, farming or gardening is, or ought to be, part of every man's business; and the soundest policy, as well as the language of the statute, forbids the taking of any of the tools so necessary to all good husbandry."[438] It is often difficult to determine what constitutes a man's trade or business, and, where there is doubt upon the subject, the courts, because of the rule that exemption laws are liberally construed, resolve it in favor of the claim of exemption. Thus, one engaged in the business of saddle, harness, and collar making is entitled to his necessary tools, though the statute purports to exempt only the tools of a single trade or profession.[439] We are conscious of an inclination in some of the states to allow cumulative exemptions in favor of persons having two or more trades. Thus, where the statute exempted from attachment a

[437] Eager v. Taylor, 9 Allen, 156. See, also, Patten v. Smith, 4 Conn. 455.

[438] Pierce v. Gray, 7 Gray, 67.

[439] Nichols v. Porter, 7 Tex. Civ. App. 302.

Digitized by Google

debtor's tools and implements of trade necessary for carrying on his trade or business, placing a limitation upon the value of the tools which might be exempted, it was held that one who was both a musician and a tinner was entitled to hold as exempt his musical instruments and the tools used in his trade of tinner, where the value of the whole was less than the statutory exemption.[440] In Iowa, certain law books and office furniture and supplies were claimed by the defendant in execution to be exempt therefrom on the ground that he was an attorney at law. In opposition to this claim it was shown that, while the defendant was an attorney at law and in the real estate business, he had other business interests which took a great portion of his time, that he did not advertise himself as an attorney, nor had he, for a long time, tried any cases in court, or had any sign about the building occupied by him, other than such books, to indicate that he was making his living by practicing law; that he drew agreements and other legal instruments, that he attended to the legal business of certain corporations with which he was connected outside of the courts, and used his legal knowledge in their business and that of such corporations, that other attorneys did not know of him as an attorney at law for several years prior to the levy of the attachment, and that it was provided in the lease of the premises occupied by him that they should be used as a real estate office, and for no other purpose. The statute of the state created an exemption from execution of certain personal property, and also of the proper tools, instruments, or books of a debtor, if a farmer, mechanic, surveyor, clergyman,

[440] Baker v. Willis, 128 Mass. 194, 25 Am. Rep. 61.

Digitized by Google

lawyer, physician, teacher, or professor. It was shown that the defendant was occupied for at least one-fourth of his time in doing the proper work of a lawyer, and that what he thus did contributed to his support, and it was held that his books were therefore exempt, because it was not necessary to his exemption that he should have earned his living by his services as a lawyer, or that he should have advertised himself as such, or appeared in any court. In this case, however, while the defendant was undoubtedly engaged in other business than that of a lawyer, yet his claim of exemption was only for those things which a lawyer might retain as exempt, and the question of duplicate exemptions, or exemptions to two distinct trades or businesses, was not presented to the consideration of the court.[441]

THIRD.—OF VARIOUS CLASSES OF EXEMPT PROPERTY.

§ 226. Tools.—In most states, tools are exempt from execution when owned by the defendant, and used by him in earning his livelihood. By some of the statutes, the exemption is confined to the tools of mechanics, while in others it is extended to every debtor in whose trade or occupation tools are necessary. Where the statute provides for the exemption of the tools of a debtor used in his trade, two questions must be presented for consideration, (1) what is a trade within the meaning of the statute, and (2) what is a tool. The word "trade" is not, as employed in these statutes, synonymous with business, occupation, or employment. It includes only the occupation of one who is a mechanic, and works at manual labor with

[441] Equitable L. A. Soc. v. Goode, 101 Iowa, 160, 63 Am. St. Rep. 378.

Digitized by Google

the aid of his tools, and not one who conducts the business of contractor, manufacturer, or merchant.[442]

The object of these statutes is to save to the debtor the means of earning his support. Hence, the debtor cannot claim as exempt tools not necessary to his trade.[443] Therefore, when the debtor in execution is a printer, and claims as exempt several printing presses, a miscellaneous assortment of type, a paper-cutting machine, and the general paraphernalia of a printing office of the value of thirty-five hundred dollars, it is proper to receive testimony from witnesses, who are practical printers, for the purpose of showing that one can carry on business and make a living with an outfit of much less value, and if the jury to whom the question is submitted, on proper instructions, finds that part only of the property claimed is necessary, the verdict will not be disregarded.[444]

There can be no necessity for tools, within the meaning of the law, for a debtor who does not intend to use them in his trade. Hence, he is not entitled to an exemption after having abandoned his trade;[445] nor where he has never exercised the trade for which the tools claimed are designed.[446] Thus, where one's business is that of a hotel-keeper, he is not entitled to

[442] Enscoe v. Davis, 44 Conn. 93, 26 Am. Rep. 430; Seeley v. Gwillim, 40 Conn. 106; Davidson v. Hannon, 67 Conn. 312, 52 Am. St. Rep. 282, holding that a photographer carries on a trade; Boston B. Co. v. Ivens, 28 La. Ann. 695; In re Whetmore, Deady, 585. The office furniture of a practicing lawyer was adjudged exempt as "tools and implements" of his trade in Abraham v. Davenport, 73 Iowa, 111.

[443] Grimes v. Bryne, 2 Minn. 104.

[444] Re Mitchell, 102 Cal. 534.

[445] Davis v. Wood, 7 Mo. 162; Atwood v. De Forest, 19 Conn. 513; Norris v. Hoitt, 18 N. H. 196; Willis v. Morris, 66 Tex. 633, 59 Am. Rep. 634.

[446] Atwood v. De Forest, 19 Conn. 513.

Digitized by Google

hold as exempt a grain-drill which he has been in the habit of hiring to contractors and others, who were putting in wheat.[447] It has been held, however, that a hotel-keeper was entitled to hold as exempt, as a tool of his trade, an omnibus used in carrying on his business.[448] One who has abandoned a trade or calling is no longer entitled to the exemptions attaching thereto. A cessation is not necessarily, and perhaps not ordinarily, an abandonment.

With respect to tools, the statute does not require that the claimant should habitually earn his living with them.[449] He may engage in other business, not amounting to any abandonment of his trade. If he is a member of a manufacturing firm, he does not lose his right to claim his tools as exempt by traveling in the interest of the firm.[450] So, if he fails in business, makes an assignment for the benefit of creditors, and is, in consequence thereof, idle and without employment, he cannot on that account, so long as he engages in no other business, be properly regarded as having abandoned the trade in which he was engaged at the time of such assignment.[451] His enlistment as a volunteer soldier in time of war, placing his tools with a friend for safe-keeping, is not an abandonment of his trade.[452] "The distinction between withdrawing from the pursuit of a particular trade or occupation with a determination never to resume it, and a temporary diversion from its prosecution, while engaged in conducting some other business or enterprise not

[447] Reed v. Cooper, 30 Kan. 574.

[448] White v. Gemeny, 47 Kan. 741, 27 Am. St. Rep. 320.

[449] Perkins v. Wisner, 9 Iowa, 320.

[450] Willis v. Morris, 66 Tex. 633, 59 Am. Rep. 634.

[451] Caswell v. Keith, 12 Gray, 351; Harris v. Haynes, 30 Mich. 140.

[452] Abrams v. Pender, Busb. 280.

Digitized by Google

intended to be of permanent or durable continuance, is clear and definite. To secure himself the privileges and benefits, intended to be conferred by the provisions of the statute, an artisan is not required to ply his trade without a possible intermission, or the occurrence of any interruption in its pursuit. If, for instance, owing to the usual stagnation of business, he cannot for a season find remunerative employment in carrying it on, or if, from personal infirmity or other intervening impediment, it becomes necessary or expedient that he should resort temporarily to some other department of industry to obtain means of supporting himself and his family, he cannot, as long as he entertains an intention to return as soon as circumstances will permit to occupation and employment in his trade, be said to have given up or abandoned it. The tools and implements requisite to carry it on in the usual and ordinary manner in which such business is conducted, are, in the meantime, still things of necessity to him within the meaning of the law." [453] The defendant cannot, as a general rule, claim more tools than are necessary for his own personal use. Hence, if a man engages in manufactures, in which it is necessary that he should own a large amount of tools to be used by his employés, these are not usually regarded as exempt.[454] So, where a man owns tools, and not being a mechanic, employs another to use them, whether in a factory or not, they are not exempt.[455] But the fact that a mechanic employs an ap-

[453] Caswell v. Keith, 12 Gray, 351.

[454] Richie v. McCauley, 4 Pa. St. 472; Smith v. Gibbs, 6 Gray, 298; Atwood v. De Forest, 19 Conn. 513; Seeley v. Gwillim, 40 Conn. 106.

[455] Abercrombie v. Alderson, 9 Ala. 981.

Digitized by Google

prentice or assistant, does not necessarily make him a manufacturer, nor does it necessarily follow that the tools used by the assistant are subject to execution; for the tools used by the principal and assistant may not, in the aggregate, exceed the number ordinarily required in carrying on the trade. Thus, in Massachusetts, where a jeweler carried on his trade with the aid of an apprentice, and that portion of the tools used by the latter was levied upon, the court held them to be exempt, saying: "The exemption is not limited merely to the tools used by the tradesman with his own hands, but comprises such, in character and amount, as are necessary to enable him to prosecute his appropriate business in a convenient and usual manner; and the only rule by which it can be restricted is that of good sense and discretion, in reference to the circumstance of each particular case. It would be too narrow a construction of a humane and beneficial statute to deny to tradesmen—whose occupation can hardly be prosecuted at all, much less to any profitable end, without the aid of assistants, as journeymen and apprentices—the necessary means of their employment." [456]

Probably the right of a defendant to the exemption of the tools of the trade in which he is engaged, cannot be made to depend on his personal skill and capacity to carry on that trade, so as to deny him the right to call others to his assistance, who have more skill, and without whose aid he would not be able to properly pursue his business. Thus, it has been held

[456] Howard v. Williams, 2 Pick. 83; Willis v. Morris, 66 Tex. 633, 59 Am. Rep. 634. The tools of a master workman are exempt. Parkerson v. Wightman, 4 Strob. 363.

Digitized by Google

that one who had some familiarity with the business of printing, or with the trade of a tinner, might undertake to carry on such business or trade, and, for that purpose, acquire the necessary tools and employ others better qualified than himself to use them, and, if he obtained his livelihood through such trade or business, that he was entitled to hold his tools as exempt, though not wholly competent to personally use them.[457]

In interpreting a statute exempting "such tools as may be necessary for upholding life," the supreme court of Vermont employed the following language: "The word 'tools,' in this statute, has long been held to extend to such farming tools as are used by hand, and to include hoes, axes, pitchforks, shovels, spades, scythes, snaths, cradles, dung-forks and other tools of that character. But it is not to include machinery, or implements used by oxen and horses, as carts, plows, harrows, mowers and reapers, etc. We think this is the sound and reasonable construction of the statute. And we see no reason why one who carries on farming to any extent should not have an adze, broad-ax, augers, and such simple mechanical tools exempt from attachment as are indispensable for repairing farming implements, and which he procures for his own use, and which he in fact uses as much as a mechanic. He is or may be compelled to perform such mechanical work, in order to get along with his ordinary farming operations, and if so, he must have the tools, and should hold them exempt from execution."[458] The supreme court of New Hampshire said

[457] Bliss v. Vedder, 34 Kan. 57, 55 Am. Rep. 237; Miller v. Weeks, 46 Kan. 307.

[458] Garrett v. Patchin, 29 Vt. 248, 70 Am. Dec. 414.

Digitized by Google

that: "The word 'tools,' as used in these statutes, is presumed to embrace such implements of husbandry, or of manual labor, as are usually employed in and are appropriate to the business of the several trades or classes of the laboring community, and according to the wants of their respective employments or professions." [459]

The word "tool" is usually understood as designating something of a simple nature, and comparatively free from complication. Hence, though a machine may possibly be so simple in its construction and operation as to be exempt as a "tool," [460] this is very rarely the case. In the vast majority of cases where the question has arisen for decision, machines have been held subject to execution.[461] Where the statute exempted "the proper tools and implements of a farmer," the court held that the statute applied only to the ordinary and usual implements of husbandry, and, therefore, that it did not exempt threshing machines.[462] That a machine may be exempt from execution as a tool or implement of the trade of the debtor, must now be ad-

[459] Wilkinson v. Alley, 45 N. H. 551. "Working tools" include, in addition to the tools in ordinary use by a mechanic, such other contrivances as the defendant may have adopted to facilitate or diminish his labor. Healy v. Bateman, 2 R. I. 454, 60 Am. Dec. 94. The tools, implements, and fixtures of a milliner are exempt. Woods v. Keyes, 14 Allen, 236, 92 Am. Dec. 765.

[460] Daniels v. Hayward, 5 Allen, 43, 81 Am. Dec. 731.

[461] Henry v. Sheldon, 35 Vt. 427, 82 Am. Dec. 644; Kilburn v. Demming, 3 Vt. 404, 21 Am. Dec. 543; Richie v. McCauley, 4 Pa. St. 471; Atwood v. De Forest, 19 Conn. 518; Seeley v. Gwillim, 40 Conn. 106; Batchelder v. Shapleigh, 10 Me. 135, 25 Am. Dec. 213; Knox v. Chadbourne, 28 Me. 160, 48 Am. Dec. 487. A weaver's loom was held to be a tool in McDowell v. Shotwell, 2 Whart. 26. A gin and gristmill are not exempt as tools. Cullers v. James, 66 Tex. 494.

[462] Meyer v. Meyer, 23 Iowa, 359, 92 Am. Dec. 432; Ford v. Johnson, 34 Barb. 364.

Digitized by Google

mitted. The difficulty is in formulating some test by which to determine when it is exempt and when not. The earlier cases incline to suggest the simplicity of its construction as such test. This is worthy of consideration, but cannot be accepted as a final or conclusive test. Perhaps the capacity of the debtor to use it by his own personal strength or skill, without the aid or assistance of other machinery or motive power, is a better test. To illustrate: a typewriter or a sewing machine is by no means simple in its construction, but it may be used by an operative, through the exercise of his personal strength and skill, and may be but the one tool by which he carries on his trade or vocation, and earns his livelihood. If so, it is exempt from execution.[463] The same rule is applicable to a lathe and its appliances necessary to enable the defendant to carry on his business as a mechanic, if it is run by one-man power, and is a tool ordinarily and necessarily used by mechanics and machinists in their trade.[464]

A gin and grist-mill is not exempt as a tool of the debtor's trade.[465] In some instances, printing-presses and type used by a practical printer have been held to be tools of his trade;[466] in others, a different conclusion has been sustained.[467] In New York, it has

[463] Woods v. Keyes, 14 Allen, 236, 92 Am. Dec. 65; Cronfeldt v. Arrol, 50 Minn. 327, 36 Am. St. Rep. 648.

[464] Re Robb, 99 Cal. 202, 37 Am. St. Rep. 48.

[465] Cullers v. James, 66 Tex. 494.

[466] Patten v. Smith, 4 Conn. 450, 10 Am. Dec. 166; Sallee v. Waters, 17 Ala. 482; Prather v. Bobo, 15 La. Ann. 524; Green v. Raymond, 58 Tex. 80, 44 Am. Rep. 601.

[467] Spooner v. Fletcher, 3 Vt. 133, 21 Am. Dec. 579; Frantz v. Dobson, 64 Miss. 631, 60 Am. Rep. 68; Danforth v. Woodward, 10 Pick. 423, 20 Am. Dec. 531; Buckingham v. Billings, 13 Mass. 82; Oliver v. White, 18 S. C. 235.

Digitized by Google

been held that a watch may, in some instances, be exempt as a working tool or as necessary household furniture.[468] The chair and foot-rest used by a barber have been decided to be exempt as tools of his trade;[469] but it is held otherwise in regard to the horse of a farmer[470] and the library of a lawyer.[471]

The question frequently arises whether, under a statute exempting mechanical tools, or the tools of a mechanic, the instruments of a professional man are protected from execution. In New York, surgical instruments have been exempted as tools.[472] In Michigan, in construing a statute exempting "mechanical tools," and determining whether it applied to the tools of a dentist, the supreme court said: "A dentist in one sense is a professional man, but in another sense his calling is mainly mechanical, and the tools which he employs are used in mechanical operations. Indeed, dentistry was formerly purely mechanical, and instruction in it scarcely went beyond manual dexterity in the use of tools; and a knowledge of the human system generally, and of the diseases which might affect the teeth, and render an operation important, was by no means considered necessary. The operations of the dentist are still for the most part mechanical, and, so far as tools are employed, they are purely so; and we could not exclude these tools from the exemption which the statute makes, without confining the con-

[468] Bitting v. Vandenburgh, 17 How. Pr. 80. See also Rothschild v. Boelter, 18 Minn. 361.

[469] Allen v. Thompson, 45 Vt. 472.

[470] Wallace v. Collins, 5 Ark. 41, 39 Am. Dec. 359; contra, as to doctor's horse and buggy, Richards v. Hubbard, 59 N. H. 158, 47 Am. Rep. 188.

[471] Lenoir v. Weeks, 20 Ga. 596.

[472] Robinson's Case, 3 Abb. Pr. 466.

Digitized by Google

struction of the statute within limits not justified by the words employed."[473] But in Mississippi, where a statute provided for the exemption of the "tools of a mechanic necessary for carrying on his trade," the court gave the following as its interpretation of the statute: "A dentist cannot be properly denominated a 'mechanic.' It is true that the practice of his art requires the use of instruments for manual operation, and that much of it consists in manual operation; but it also involves a knowledge of the physiology of the teeth, which cannot be acquired but by a proper course of study; and this is taught by learned treatises upon the subject, and as a distinct, though limited, department of the medical art, in institutions established for the purpose. It requires both science and skill; and if such persons could be included in the denomination of 'mechanics,' because their pursuit required the use of mechanical instruments and skill in manual operation, the same reason would include general surgeons under the same denomination; because the practice of their profession depends in a great degree upon similar instruments and operative skill. Nor could such a pursuit properly be said to be a 'trade.' That term is defined to denote 'the business or occupation which a person has learned, and which he carries on for procuring subsistence or for profit—particularly a mechanical employment, distinguished from the liberal arts and learned professions, and from agriculture.' It is manifest that a pursuit requiring a correct knowledge of the anatomy and physiology of a part of the human body, as well as mechanical skill in

[473] Maxon v. Perrott, 17 Mich. 332. 97 Am. Dec. 191. The instruments of a dentist are exempt in Louisiana. Duperron v. Communy, 6 La. Ann. 789.

Digitized by Google

the use of the necessary instruments, could not be properly denominated a trade." [474]

A photographer has been held not to be a mechanic and, therefore, not entitled to the exemptions of a mechanic. "The photographer is an artist, not an artisan, who takes impressions or likenesses of things and persons on prepared plates or surfaces. He is no more a mechanic than the painter who, by means of his pigments, covers his canvas with the glaring images of natural objects. And his tent, bins, camera-stand, camera-box, head-rest, bath-holder, etc., are no more tools, within the meaning of the exemption laws, than the tent, stool, easel, hand-rest, brushes, pigment-box, and paints, glaze, etc., of the painter. The exemption was not intended to extend to these artists, and their tools of trade." [475] On the other hand, under statutes exempting from execution the implements of the debtor's trade, it was held that a photographer carried on a trade, and, hence, that his implements were exempt from execution.[476] The building in which a photographer carries on his business, though personal property, is not a "tool," or "instrument." [477]

A searcher of records or abstractor of titles is not a mechanic, does not carry on a mechanical trade, and, therefore, is not entitled to an exemption from execution of his books and papers, under a statute exempting "the proper tools, instruments, or books of the

[474] Whitcomb v. Reid, 31 Miss. 567, 66 Am. Dec. 579. A person engaged in the business of a merchant is not entitled to exemption of a wagon as a tool for carrying on his business. Gibson v. Gibbs, 9 Gray, 62; Wilson v. Elliott, 7 Gray, 69.

[475] Story v. Walker, 11 Lea, 517, 47 Am. Rep. 305.

[476] Davidson v. Hannon, 67 Conn. 312, 52 Am. St. Rep. 282.

[477] Holden v. Stranahan, 48 Iowa, 70.

Digitized by Google

debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor." [478]

§ 226 a. Implements, Utensils, etc.—In some of the statutes of exemptions words are used nearly synonymous with the word "tools," and yet apparently of a more extensive signification. Thus, in some statutes "farming utensils or implements of husbandry," the tools or implements of a mechanic or artisan, are exempted; [479] in others the exemption is of "the proper

[478] Tyler v. Coulthard, 95 Ia. 705, 58 Am. St. Rep. 452. In this case the court said: "It is averred in the petition that the plaintiff is a mechanic, and that he habitually earns his living by compiling and arranging and making abstracts of titles, and that the property in controversy consists of the necessary tools, books, and instruments by the use of which he obtains a living for himself and family. It is apparent that the plaintiff does not come within any other class of persons named in the statute. That proposition is too plain for discussion. And, in our opinion, there is but little more reason for holding that the occupation of the plaintiff is that of a mechanic. In the common acceptation of the meaning of the word, to designate an abstractor of titles as a 'mechanic' would be regarded, to say the least, as a very inaccurate form of speech. A mechanic is defined by Webster to be 'one who works with machines or instruments; a workman or laborer other than agricultural; an artisan; an artificer; more specially one who practices any mechanic art; one skilled or employed in shaping and uniting materials, as wood, metal, etc., into any kind of structure, machine, or other object requiring the use of tools or instruments.' It is true, as claimed by counsel for appellant, that courts construe exemption statutes liberally, to the end that they may be carried out in their object and spirit. We need not cite the numerous cases decided by this court in which that principle is announced. But we are aware of no authority for carrying this rule to the extent of adding an exempted class of persons to those enumerated in the statute. Appellant relies very much upon the case of Davidson v. Sechrist, 28 Kan. 324. But the statute of Kansas exempting the necessary tools and instruments of any mechanic, miner, 'or other person' 'used in his trade or business,' includes all kinds of occupations, and the decision in that case did not include a class of persons not named in the statute."

[479] Code Civ. Proc. Cal., sec. 690; Elder v. Williams, 16 Nev. 421.

Digitized by Google

tools and implements of a farmer," or "the proper tools, instruments, or books of the debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor,"[480] or "necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business;"[481] and farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars.[482] So far as we are aware, none of the courts have undertaken to define the word "implements" as used in these statutes. The lexicographers define it as "whatever may supply a want; especially an instrument or utensil as supplying a requisite to an end; as the implements of trade, of husbandry, or of war"; and a utensil they declare to be "that which is used; an instrument, an implement; especially an instrument or vessel used in a kitchen, or in domestic and farming business." By the courts, these words are accorded a broad signification, and exempt many things which are not tools. Thus, statutes exempting implements or utensils have been adjudged to exempt a printing-press, type, and other articles, used in publishing a newspaper,[483] a piano used by a music teacher, and upon which she relied for support,[484] a mower, suitable for use by a farmer,[485] a lamp and show-cases used by a mechanic,[486] articles used by the owner in making cheese-vats, cheese-presses, curd-

[480] Code Iowa, § 4008.

[481] Bliss v. Vedder, 34 Kan. 59, 55 Am. Rep. 237.

[482] Donmyer v. Donmyer, 43 Kan. 444.

[483] Bliss v. Vedder, 34 Kan. 59, 55 Am. Rep. 237; Sallee v. Waters, 17 Ala. 482; Green v. Raymond, 58 Tex. 80, 44 Am. Rep. 601.

[484] Amend v. Murphy, 69 Ill. 337.

[485] Humphrey v. Taylor, 45 Wis. 251, 30 Am. Rep. 738.

[486] Bequillard v. Bartlett, 19 Kan. 385, 27 Am. Rep. 120.

Digitized by Google

knives, cheese-hoops, and hoisting apparatus,[487] a clock, stove, screen, pitcher, and table cover of a milliner, necessary for carrying on her business,[488] a sewing-machine,[489] various kinds of musical instruments.[490] Some of the decisions respecting the exemption from execution of musical instruments, are apparently irreconcilable, though probably their repugnancy has resulted from some difference in the phraseology of the statutes on which they were based. Thus, in some of the states, pianos have been adjudged to be exempt, and in others not. If the claimant is a teacher or a person for whose use the instrument is necessary in his profession or business, it may doubtless be exempt, as an implement of that business or profession.[491] If, on the other hand, the owner is not shown to be one to whose business the instrument is necessary, and the only claim of exemption is under a provision of the statute exempting household furniture, it is doubtful whether the claim can be sustained.[492] A like conclusion was reached under a statute purporting to exempt to each householder the household goods, furniture, and utensils, not exceeding in value two hundred and fifty dollars.[493] We are not sure that a piano may not properly be regarded as an article of household furniture,[494] but it may unquestionably be deemed an instrument.

[487] Fish v. Street, 27 Kan. 270.
[488] Woods v. Keyes, 14 Allen, 236, 92 Am. Dec. 765.
[489] Rayner v. Whicher, 6 Allen, 294.
[490] Baker v. Willis, 123 Mass. 195, 25 Am. Rep. 61; Goddard v. Chaffee, 2 Allen, 395, 79 Am. Dec. 796.
[491] Amend v. Murphy, 69 Ill. 337.
[492] Dunlap v. Edgerton, 30 Vt. 224; Tanner v. Billings, 15 Wis. 173
[493] Kehl v. Dunn, 102 Mich. 581.
[494] Alsup v. Jordan, 69 Tex. 300, 5 Am. St. Rep. 53.

Digitized by Google

A safe used by a jeweler in his business, and without which it cannot be conducted to a profitable end, may be held exempt under a statute exempting the implements of a mechanic or artisan, necessary to carry on his trade.[495] Under the same principle, a lens of a photographer may be exempt as an implement of his trade.[496] Under a statute exempting the tools, apparatus, and books of any trade or profession, the safe of an insurance agent, used as a place of deposit for notes and policies of insurance and other papers, pertaining to the business, is exempt.[497] In fact, there seems to be no limitation of the things which may be held exempt as implements, save that of necessity. If they are necessary in the debtor's trade or calling, they are exempt, though they are not mere tools, but are complicated and expensive machinery. Threshing machines have repeatedly been adjudged not exempt, but solely because the evidence showed that the particular machine in controversy was chiefly used in working or threshing for others than the owner. In the most recent decision on this topic, the court said: "In our opinion, the legislature meant by the words, 'the farming utensils or implements of husbandry of the judgment debtor,' such utensils or implements as are needed and used by the farmer in conducting his own farming operations; and it was not intended that all farming machinery which a farmer may own should be exempt, because, while he uses it chiefly by renting it out, or in doing work on others' farms for hire, he still uses it to a small extent on his own land. To hold otherwise would enable the farmer who cultivates

[495] Re McManus' Estate, 87 Cal. 292, 22 Am. St. Rep. 250.
[496] Davidson v. Hannon, 67 Conn. 312, 52 Am. St. Rep. 282.
[497] Betz v. Maier, 12 Tex. Civ. App. 219.

Digitized by Google

forty acres to invest a large amount of money in expensive implements, and to hold them free and clear of his creditors, though they were used but for a day on his own land, and for all the balance of the year were rented or hired out to others. A reasonable construction should be given to the statute, and not one which would pervert its benevolent design, and enable gross frauds to be perpetrated under color of law."[498] If the statute does not impose any restriction upon the value of the implements, which are by it declared to be exempt from execution, the courts are powerless to create one. Hence, a combined harvester, a machine of great value, which at the same time cuts and threshes grain, is exempt under a statute exempting farming utensils and implements of husbandry.[499] Nor is the right of the claimant to his exemption impaired by the fact that it was usually his custom to use his harvester for hire to thresh the crops of others after doing his own threshing. "It would be a hard rule upon the debtor to hold that, although the property was necessary to carry on his farming, he would forfeit the exemption should he seek to earn something with it, after he had ceased to need it for his own farming."[500] Though an implement may be used to some extent on a farm, it is not exempt as an implement of husbandry if its chief use is for hire or rent to others. Hence, it was held that a well-drill and derrick, though owned by a farmer, were not exempt from execution. "Such articles as he keeps for hire, or uses chiefly by renting out, and only

[498] In re Baldwin, 71 Cal. 78; Meyer v. Meyer, 23 Iowa, 359, 92 Am. Dec. 432.

[499] Estate of Klemp, 119 Cal. 41, 63 Am. St. Rep. 69.

[500] Spence v. Smith, 121 Cal. 536, 66 Am. St. Rep. 62.

Digitized by Google

uses to a slight extent on his own farm, as the boring of one well, are not within the terms of the statute." [501]

§ 227. **A Team,** according to the definition given by Webster, is "two or more horses, oxen, or other beasts, harnessed together to the same vehicle, for drawing." This definition does not, in all respects, coincide with that which has been given to the world in the various decisions made by the courts in interpreting the different exemption statutes. In the first place, we know of no instance in which the debtor has successfully claimed more than two beasts as his exempt team. In the second place, it is quite certain, under these decisions, that one beast may constitute a team, and may be exempt from execution, where it is used by the defendant for the same purposes for which he would use a team of two beasts if he were so fortunate as to possess that number.[502] So, where the law exempts a "yoke of oxen," the judges will exempt a single ox or bull, if he is broken to harness, or otherwise employed to assist the defendant for the purposes for which a yoke of oxen would be used.[503] Nor need he be broken, if purchased for the purpose of being broken and used as a part of a team. Manifestly, if the debtor is to be allowed a team, the law will not insist on his purchasing it already broken, but will allow him to proceed in the manner which will most accord with his impoverished circumstances, to wit, by procuring unbroken animals, and converting them into

[501] Nelson v. Fightmaster, 4 Okla. 38.

[502] Wilcox v. Hawley, 31 N. Y. 648; Harthouse v. Rikers, 1 Duer, 606; Lockwood v. Younglove, 27 Barb. 505; Finnin v. Malloy, 33 N. Y. Sup. Ct. 382; Hoyt v. Van Alstyne, 15 Barb. 568; Knapp v. O'Neill, 46 Hun, 317.

[503] Wolfenbarger v. Standifer, 3 Sneed, 659; Bowzey v. Newbegin, 48 Me. 410.

Digitized by Google

a useful team as rapidly as practicable.[504] The statutes of Oklahoma exempt from execution a yoke of work oxen. It was, hence, claimed that, though a debtor had animals of proper size, age, and character, and which were intended to be used as work oxen, his failure to so use them was fatal to his claim. The supreme court was of the opinion that to so hold would defeat the object of the statute, saying: "The purpose of the law is to exempt to the husbandman a pair of cattle to be used for work; cattle of the class suitable for oxen, and that will make work oxen, and which it is the evident purpose of the claimant to use for that purpose," and that the fact that the cattle had not been brought to the degree of control where they could actually be worked did not require the owner to surrender them as exempt from execution.[505] It is evident that the judges have looked to the object, rather than at the wording of the statutes; and seeing that the legislature intended to protect the poor debtor in the use of a team, the judges have thought that the like intent must have existed where he had only half a team. The exemption of "a span of horses" has been held not to protect a four months old colt, which, with its mother, constituted the debtor's only horses.[506] Two calves, less than a year old, have been exempted as a "yoke of steers";[507] and an ass has been exempted under a statute allowing the defend-

[504] Mallory v. Berry, 16 Kan. 293; Berg v. Baldwin, 31 Minn. 541. In Vermont a colt bought when suckling, and intended for use for team-work when of sufficient age, was held to be subject to attachment when about two years old, and after it had been used to a limited extent, harnessed to a sled, for the purpose of drawing wood and water. Sullivan v. Davis, 50 Vt. 649.

[505] Nelson v. Fightmaster, 4 Okla. 38.

[506] Ames v. Martin, 6 Wis. 361, 70 Am. Dec. 468.

[507] Mundell v. Hammond, 40 Vt. 641.

Digitized by Google

ant "a horse, mule, or yoke of oxen." [508] In New York it is clear that the word "team" is not confined to the beasts harnessed together. It embraces the harness and vehicle with which the beasts are commonly used, and without which they would be of comparatively little value to the debtor.[509] A team cannot be held as exempt, unless the claimant shows that he is one of the persons for whom the exemption is provided by statute.[510] He must also show that the property claimed is used by him as a team, or has been procured for the purpose of being so used.[511] Hence, where a physician claimed two horses as exempt, the exemption was denied as to one of the horses, because it was not used by him as a part of his team.[512] But where a man is about to change his occupation, and, with that end in view, purchases a team, and it is attached before he has any opportunity to make any use of it, he is nevertheless entitled to hold it as exempt.[513] Where a man shows that he uses his team in his business, it is regarded as necessary and is to be treated as exempt although he may have other property of great value, and may, in fact, be able to live without the aid of a team.[514] If it be true that the exemption of a team, or of animals out of which a team may be made, implies that the exemption is for the

[508] Richardson v. Duncan, 2 Heisk. 220.

[509] Harthouse v. Rikers, 1 Duer, 606; Eastman v. Caswell, 8 How. Pr. 75; Van Buren v. Loper, 29 Barb. 388; Dains v. Prosser, 32 Barb. 290; Hutchins v. Chamberlain, 11 N. Y. Leg. Obs. 248; contra, Morse v. Keyes, 6 How. Pr. 18.

[510] Calhoun v. Knight, 10 Cal. 393.

[511] O'Donnell v. Segar, 25 Mich. 367.

[512] Corp v. Griswold, 27 Iowa, 379.

[513] Bevan v. Hayden, 13 Iowa, 122.

[514] Smith v. Slade, 57 Barb. 637; Wheeler v. Cropsey, 5 How. Pr. 288; Wilcox v. Hawley, 31 N. Y. 658.

Digitized by Google

purpose of enabling the debtor to retain work animals, then the exemption must be denied, if the animals in question have not been kept for work, but for some other purpose, and they are not of the character which the debtor may reasonably be expected to employ as a team. Hence, it was held that the owner of two stallions, which he had kept in use solely for breeding purposes, never for working upon or about his farm, could not be held to be exempt from execution.[515]

Some of the statutes exempt a team, "kept and used for team-work"; and this keeping and using would be clearly essential, whether expressly mentioned in the statute or not. When there is some evidence tending to show this use, the question is one of fact to be submitted to the jury. "Team-work" means work done by a team as a substantial part of a man's business, as in farming, staging, express carrying, drawing of freight, peddling—the transportation of material used or dealt in as a business. This is clearly distinguishable from what is circumstantial to one's business as a matter of convenience in getting to and from it, or as a means of going from place to place to solicit patronage, or to settle or make collections, or to see persons for business purposes. It is plainly distinguishable from family use and convenience, pleasure, exercise, or recreation. None of these uses of a horse are suggested by the expression "kept and used for teamwork."[516]

If the exemption is of animals, by the use of which a huckster, peddler, teamster, or other laborer habitually earns his living, it may be that the debtor can be denied exemption, on the ground that his use of the property in question has not been that of a laborer,

[515] Kreig v. Fellows, 21 Nev. 307.
[516] Hickok v. Thayer, 49 Vt. 375.

Digitized by Google

or of one who works with his team. Thus, the team may have been kept solely for hire, as by one whose business is that of keeping a livery stable. It has been held that he is not a teamster, nor entitled to exemption as such, though he drives his team in carrying persons about the town in which he does business. Neither is he a laborer within the meaning of the statute. Therefore, he is not within its protection, and may not retain a team as exempt from execution.[517]

It is not essential that the animals claimed as a team be in use as such at the time of the levy. To exact a constant use of them would impose a burden on the debtor as difficult to bear as a denial of his claim for exemption. "It has never been understood that an actual user of the animal for team-work at the time its exemption from attachment was claimed was necessary; such a construction would defeat the evident purpose of the statute. Future intended use is as controlling upon the question of exemption as any past use. 'Kept and used' signifies that the animal must be kept for team-work and must be in actual use, or must be kept with the honest intention and purpose of the owner, within a reasonable time thereafter, to use him for team-work, as occasion may require, to enable him, with the aid of the animal, to procure a livelihood."[518] The statute of Illinois exempts "one yoke of oxen, or two horses in lieu thereof, used by the debtor in obtaining the support of his family." This was construed as exempting horses not used by the debtor personally, but driven by another person in hauling for sundry persons for compensation, the debtor receiving one-half of the moneys earned thereby.

[517] Edgecomb v. Creditors, 19 Nev. 149.
[518] Rowell v. Powell, 53 Vt. 304.

Digitized by Google

The words "used by the debtor in obtaining the support of his family" are general, and restricted to no particular mode of use. They are answered when the team is hired to others for compensation, which compensation goes into the general fund to support the family, as well as where the debtor himself goes with the team as its driver, and adds the earnings to his labor or to that of the team. A team kept for pleasure, merely, is not within either the letter or the spirit of the statute. The team must be kept and used in good faith to contribute to the means of support of the family, but, when it is thus kept and used, we do not consider it important by whom it is taken care of and used. In this matter, as in very many others, the act of the agent or servant is to be regarded as the act of the principal or master. The use is his use, whether by his own hands or by those of another.[519]

§ 228. The "Term 'Wagon'" is intended to mean a common vehicle for the transportation of goods, wares, and merchandise of all descriptions. A hackney-coach, used for the conveyance of passengers, is a different article, and does not come within the equity or literal meaning of the act." [520] We doubt whether this decision, in so far as it excludes a hackney-coach from exemption, will be followed in other states. The tendency of the courts is toward an extremely liberal construction of the exemption laws. Hence, all four-wheeled vehicles, whether used to transport persons or things, are usually held to be exempt as wagons.[521]

[519] Washburn v. Goodheart, 88 Ill. 231.

[520] Quigley v. Gorham, 5 Cal. 418, 63 Am. Dec. 139.

[521] Kimball v. Jones, 41 Minn. 318; Rogers v. Ferguson, 32 Tex. 533; Nichols v. Claiborne, 39 Tex. 363, in which carriages and buggies were held exempt.

Digitized by Google

In Kansas the court thought the word "wagon" was sufficiently comprehensive in its ordinary signification to include a buggy; but held that the exemption statute of that state showed an intention to qualify the term so as to exclude buggies.[522] The exemption of a buggy as a wagon was at first denied,[523] but afterward conceded,[524] in Minnesota. In Texas, a dray is exempt as a wagon,[525] and in Wisconsin, a hearse is held to be within the same exemption.[526] In Alabama it was held that the exemption of "carts," included wagons;[527] and, in Tennessee, that the exemption of "a two-horse wagon" included a wagon which in fact had always been drawn by oxen, but which it was possible to use as a two-horse wagon.[528] Though the courts have exhibited great liberality in construing the word "wagon," when used in the statute of exemptions, they have drawn the line at bicycles, and declared that they cannot be held as exempt, either as wagons, carts, or drays,[529] nor as tools or apparatus of the judgment debtor's profession.[530]

§ 229. **The Exemption of "a Horse"** has been held to imply that the animal must be a work-horse. The object of the law is to provide the debtor with the means of carrying on his vocation. Hence, a stallion, used solely for the purpose of propagation, is not exempt

[522] Gordon v. Shields, 7 Kan. 320.
[523] Dingman v. Raymond, 27 Minn. 507.
[524] Allen v. Coates, 29 Minn. 46.
[525] Cone v. Lewis, 64 Tex. 331, 53 Am. Rep. 767.
[526] Spikes v. Burgess, 65 Wis. 428.
[527] Favers v. Glass, 22 Ala. 621; Kreig v. Fellows, 21 Nev. 307; Smith v. Dayton, 94 Ia. 102.
[528] Webb v. Brandon, 4 Heisk. 285.
[529] Shadewald v. Phillips, 72 Minn. 520.
[530] Smith v. Horton, 19 Tex. Civ. App. 28.

Digitized by Google

from execution;[531] but it would be otherwise if he were kept exclusively or chiefly as a work-horse.[532] In order to entitle a claimant to retain his horse, it is not essential that the animal should have been broken to harness, or that it should have been used in the manner in which other people commonly employ their horses. It is sufficient that the horse does work or drudgery for the defendant or his family. The method in which he is made to do this is immaterial.[533] Though the statute exempts "horses," the courts have held that the term includes "colts," where the debtor has not the number of horses allowed him by law.[534] If, however, the debtor has a pair of work-horses, the officer is justified in levying upon a two year old colt, which has never been broken, and which is, therefore, not fit for present use as a work-horse.[535]

"The usefulness and service of a mule are identical with that of a horse, at least so far as the exemption is concerned; and, as in common parlance the mule is hardly distinguishable from the horse, we are of the opinion that the word 'horses,' as used in the statute, includes mules also."[536] In some of the states, the exemption of horses and other animals is held to be absolute and not dependent upon any use made thereof by the judgment debtor, or any necessity for retaining them in his trade or business. Such has been the construction given to the statute of Kansas, exempting from execution two cows, ten hogs, one yoke oxen, and one horse or mule, or, in lieu of one yoke of oxen and

[531] Roberts v. Adams, 38 Cal. 383, 99 Am. Dec. 413.
[532] Allman v. Gann, 29 Ala. 240; McCue v. Tunstead, 65 Cal. 506.
[533] Noland v. Wickham, 9 Ala. 169, 44 Am. Dec. 435.
[534] Kennedy v. Bradbury, 55 Me. 107, 92 Am. Dec. 572.
[535] Hogan v. Neumeister, Mich. 76 N. W. 65.
[536] Allison v. Brookshire, 38 Tex. 202.

Digitized by Google

one horse or mule, a span of horses or mules.[537] In Colorado, the exemption is of the tools, working animals, and stock in trade not exceeding three hundred dollars in value of any mechanic, miner, or other person, not being the head of a family, used and kept for the purpose of carrying on his trade or business while he is a bona fide resident of the state. Under this statute a married woman, though living with her husband is, if doing business in her own name, entitled to hold as exempt a horse or horses, not exceeding in value the amount specified in the statute.[538] A single man engaged in assaying, sampling, and working ores is, under this statute, entitled to retain as exempt a horse, harness, and buckboard, necessary for use in his business. The words "or other person" do not limit the business or trade entitled to exemption to that of a mechanic or miner, nor to persons who earn their livelihood by manual labor, as skilled artisans or handicraftsmen.[539]

§ 230. **Under the Statutes Exempting Cows** from execution, the only question which, so far as we are aware, has arisen for decision is, whether a heifer is, for the purposes of exemption, to be regarded as a cow. The answer has been that "a heifer is a young cow, and as such exempt from attachment, if the debtor has no other."[540] Under a statute exempting five milch

[537] Young v. Bell, 1 Kan. App. 265; Wilhite v. Williams, 41 Kan. 288, 13 Am. St. Rep. 281.

[538] Scott v. Mills, 7 Colo. App. 155.

[539] Watson v. Lederer, 11 Colo. 577, 7 Am. St. Rep. 263.

[540] Johnson v. Babcock, 8 Allen, 583; Pomeroy v. Trimper, 8 Allen, 403, 85 Am. Dec. 714; Freeman v. Carpenter, 10 Vt. 433, 33 Am. Dec. 210; Dow v. Smith, 7 Vt. 465, 29 Am. Dec. 202. In these cases, the heifer in controversy was between one and two years of age. A yearling heifer held not to be exempt under a statute exempting two cows and a calf. Mitchell v. Joyce, 69 Iowa, 122.

Digitized by Google

cows, it has been held that a debtor, owning two cows which were giving milk, and three two year old heifers, which were being raised, kept, and intended for family use, was entitled to hold the whole as exempt from execution. The court said: "It is true our statute exempts 'milch cows,' but to hold to the letter of the law would be to subject a milch cow to levy and sale as soon as she became dry, so that the same cow would be exempt one season of the year, and subject to levy at another season. This is not the intention of our statute. It is intended to exempt to each head of a family, five milch cows suitable for, intended to be used for, and kept for, milch cows. The fact that such cow is not actually giving milk is immaterial, nor will it defeat the right of exemption that she has never actually given milk."[541] In Kentucky, under a statute exempting two cows and calves, if a debtor has a cow and calf and two heifers the cow is primarily exempt, and the officer must take notice of that fact without any demand upon him by the debtor, although, if he had no cow, a heifer would be allowed as exempt in lieu of a cow.[542] The courts of Iowa, for some reason not disclosed by them, have not followed the decisions of other states upon this subject. The code of that state exempts two cows and a calf. It was said that a yearling heifer did not come within the provisions of this statute, and hence was not exempt. The report of the case does not show whether the claimant owned any other animals than that claimed as exempt.[543] It is also insisted that when the law exempts a thing, it impliedly authorizes the debtor to obtain

[541] Nelson v. Fightmaster, 4 Okla. 38.
[542] Stirman v. Smith, (Ky.) 10 S. W. 131.
[543] Mitchell v. Joyce, 69 Ia. 121.

Digitized by Google

that thing on the most advantageous terms within his reach. Therefore it is claimed that the exemption of a cow implies that the debtor may procure one by buying and raising a heifer. In Vermont, the exemption of the debtor's only cow has been held to include the exemption of butter made from her milk,[544] because the legislature could not have intended that the debtor should keep the cow for the sake of giving the creditor the profits of her keeping. Where every head of a family is by statute allowed as exempt two cows, the right to such exemption is absolute, and cannot be defeated by showing that they were not necessary to the support of the debtor or his family.[545] We have already suggested that, though an exemption is intended for the benefit of the family of the debtor, as well as of himself, still he, as the head of the family, is ex officio its manager and agent, and hence is entitled to select the articles which he will claim as exempt. Therefore, if he has more cows than he may retain by statute, he may designate those which he wishes to surrender in execution, and with this designation his wife cannot interfere, nor can she by any mode assert a right of exemption in those animals which he has selected as subject to execution.[546]

§ 231. Household Furniture.—A trunk and cabinet-box having been claimed as exempt as household furniture, the court, in giving its reasons for denying the claim, said: "The expression 'household furniture' must be understood to mean those vessels, utensils, or goods which, not becoming fixtures, are designed in

[544] Leavitt v. Metcalf, 2 Vt. 342, 19 Am. Dec. 718.
[545] Nuzman v. Schooley, 36 Kan. 178.
[546] Harley v. Procunier, 115 Mich. 53, 69 Am. St. Rep. 546.

Digitized by Google

their manufacture originally and chiefly for use in the family as instruments of the household, and for conducting and managing household affairs. Neither of these articles would seem to hold such a place in the domestic economy. The trunk, though often perhaps made to some extent to take the place of the chest of drawers, the bureau, or the wardrobe, is nevertheless in its construction designed for and adapted to the use of the traveler as such rather than the householder. By the cabinet-box we understand an article designed, in its material and workmanship, rather for ornament than use, and, so far as designed for use, intended for keeping jewelry and other small articles of value; thus ministering to the taste of the owner rather than the necessities or convenience of the household."[547] A piano is not an article of household furniture; its primary and principal use is as a musical instrument.[548] We have already suggested that a piano may be exempt as household furniture. The statutes of Texas purport to exempt all household and kitchen furniture. In construing this statute the supreme court of that state said: "The word 'furniture' is one of very broad signification, and, according to lexicographers, embraces all suitable, necessary, convenient, or ornamental articles with which a residence is equipped." It therefore sustained an instruction of the trial court, which, in substance, authorized the jury to find that a piano is exempt from execution, if used in the family as an article of furniture and for the purpose of teach-

[547] Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726.

[548] Tanner v. Billings, 18 Wis. 163, 86 Am. Dec. 755; Dunlap v. Edgerton, 30 Vt. 224; Kehl v. Dunn, 102 Mich. 581, 47 Am. St. Rep. 561.

Digitized by Google

ing music to the children thereof.[549] The definition of household furniture thus approved by the court is supported by several authorities,[550] but they were not cases involving the question of exemptions, and the propriety of applying them to the construction of the exemption laws is questionable. They were cases of bequests or leases of the household furniture of the decedent or lessor. Where, however, the articles claimed as exempt are conceded to be household furniture, a liberal allowance will be made. Under ordinary circumstances, it will be incumbent on the plaintiff in execution to show that the furniture of the defendant is excessive in quantity, and far beyond what is needed for immediate use in the family.[551] No beds can be taken where the family consists of five persons, and has provided itself with six beds.[552] But if the furniture on hand is designed for the purpose of keeping a boarding or lodging house, it may, so far as it is in excess of family necessities, be taken in execution.[553] Though the furniture which is exempt is not used by the claimant wholly for his own family, but partly for boarders and lodgers, it is evident that the courts will construe the statutes very liberally in his favor, and will not make the use of the property a reason for subjecting it to execution if it would have been deemed exempt had such boarders and lodgers not been taken. Where the statute does not limit the

[549] Alsup v. Jordan, 69 Tex. 300, 5 Am. St. Rep. 53.

[550] Richardson v. Hall, 124 Mass. 228; Hooper's Appeal, 60 Pa. St. 220, 100 Am. Dec. 562; Kellt v. Powlet, Amb. 605; Cremoone v. Antrobus, 5 Russ. 312, 319.

[551] Heath v. Keys, 35 Wis. 668.

[552] Haswell v. Parsons, 15 Cal. 266, 76 Am. Dec. 480; Dickerson v. Van Tine, 1 Sand. 724.

[553] Weed v. Dayton, 40 Conn. 296, 13 Am. Law Reg. 603.

Digitized by Google

value of the furniture which may be held as exempt, nor declare that the exemption shall be restricted to necessary household and kitchen furniture, it is difficult to see at what point the exemption must stop, and certainly if the furniture in question is not in amount and character entirely inappropriate for an ordinary family, taking into consideration that it may extend its hospitality to a reasonable number of guests, the exemption will not be denied or restricted because the circumstances of the family require it to make the furniture a source of profit or livelihood by accommodating boarders or lodgers.[554]

The fact that furniture is in temporary disuse does not prevent its being exempt from execution.[555] "The exemption is not necessarily restricted to such furniture as is in constant use; nor is it as before suggested, restricted to the use of the debtor himself. Reasonable provision may be made, according to circumstances, for wife and children, for domestics, for dependent relatives who may be residing with and constitute a part of the family, and for visitors."[556] In many of the states the statute, instead of exempting all the household furniture of the debtor, exempts only necessary household furniture. But the word "necessary" is always given a liberal construction. It is never treated as synonymous with "indispensable." It embraces all those articles which enable the family to live conveniently and decently, according to the custom of the country in which they reside. "We think the word 'necessary' was not intended to denote those articles of furniture only which are indispensable to the bare

[554] Mueller v. Richardson, 82 Tex. 361.
[555] Ibid.
[556] Ibid.

Digitized by Google

subsistence of the persons for whose benefit the law was designed—the debtor and his family. According to such a limited construction, it would exclude many things which universal usage and the common understanding of that word in reference to this subject have pronounced to be necessary articles of household furniture; and would, indeed, protect merely those rude contrivances which are used only in a savage state. The word was obviously used in a larger sense; it was intended to embrace those things which are requisite in order to enable the debtor not merely to live, but to live in a convenient and comfortable manner." [557] Nevertheless, it cannot be extended by taking into consideration the debtor's present or past station in life, and the mode of living to which he and his family have been accustomed. Articles which are unusually valuable, so as properly to be regarded as ornaments, cannot be exempt under a statute exempting "household furniture necessary for supporting life." "The law intends that the debtor, when withholding money from his creditor for furniture, shall supply each class of his necessities, and secure his comfort and convenience by expending money in a reasonably economical manner, looking solely to utility." [558] Though the exemption purports to be of "all household and kitchen furniture," it must be restricted to such furniture as is appropriate to the use of the debtor and his family,

[557] Montague v. Richardson, 24 Conn. 338, 63 Am. Dec. 173; Davlin v. Stone, 4 Cush. 359. It has been held that a watch may sometimes be exempt as necessary household furniture. Willson v. Ellis, 1 Denio. 462; Leavitt v. Metcalf. 2 Vt. 342. 19 Am. Dec. 718.

[558] Hitchcock v. Holmes, 43 Conn. 528. The articles of which exemption was denied in this case consisted of lace curtains of the value of $160, hanging over curtains of cloth, a pier-glass with base valued at $125, a clock of the value of $50.

Digitized by Google

and cannot include that which he may have and use in conducting a hotel or restaurant beyond what is used by his family;[559] nor, on the other hand, can he be deprived of the household furniture appropriate for the use of his family, because he is the keeper of a boarding-house.[560]

In some of the states the household furniture to which a debtor is entitled as exempt is by statute limited by value only. Where this is the case, the furniture exempt "may be pictures hung upon the walls, or other furniture, or mere ornaments, or bedroom furniture for visitors only, or bedroom furniture, tableware, etc., for paying guests, boarders, etc." "The word 'furniture' is a comprehensive term embracing about everything with which a house or anything else can be furnished. It evidently means everything with which the residence of the debtor is furnished."[561]

Sometimes furniture may be held as exempt because of its use in a particular business and without relying upon any statutory provision describing, or professing to exempt, furniture of any character. Thus under a section of the code of Iowa providing for the exemption of the proper tools, instruments, and books of a lawyer, he was held to be entitled to the exemption from execution of his office furniture on the ground that it fulfilled "all the essential ideas of an instrument," and that "the value to a lawyer of the ordinary office furniture which he uses in doing his work is so much greater than it can be to his creditors, that we

[559] Heidenheimer v. Blumenkron, 56 Tex. 308; Dodge v. Knight (Tex.) 16 S. W. 626.

[560] Vanderhorst v. Bacon, 38 Mich. 669, 31 Am. Rep. 328; Mueller v Richardson, 82 Tex. 361.

[561] Rasure v. Hart, 18 Kan. 344, 26 Am. Rep. 772.

Digitized by Google

think it comes within the spirit of the exemption statute."[562]

§ 232. **Wearing Apparel** was exempt from execution at common law. The exemption, however, was very limited in its character, and was probably confined to the garments in which the debtor was clad.[563] If he had two coats, it was safe for the officer to seize one. In fact, it is quite doubtful whether the exemption was not dependent upon the apparel being found on the debtor's person. However this may be, it has been held in New York that no officer has the right to deprive a defendant of the means of preventing his person from being exposed to the inclemency of the weather and the observation of the populace; and therefore, that though the debtor is in bed, and not using his wearing apparel, yet that it cannot be attached.[564] The common law has in most of the states, so far as concerns this exemption, been supplanted by statutes under which it is certain that the debtor need not always keep his clothes on to insure their protection from the rapacity of his creditor. Some of these statutes exempt all wearing apparel; others exempt only such as is necessary. Under the first class of statutes, a lace shawl, being wearing apparel, is exempt, irrespective of its cost if it was bought bona fide for use, and not with a view of acquiring property which should be beyond the reach of creditors.[565] Wearing apparel consists of "garments worn to protect the person from exposure, and not articles used for ornament

[562] Abraham v. Davenport, 73 Ia. 111, 5 Am. St. Rep. 665.

[563] Cooke v. Gibbs, 3 Mass. 193; Sunbolf v. Alford, 3 Mees. & W. 248; Wolff v. Summers, 2 Camp. 631; Bowne v. Witt, 19 Wend. 475.

[564] Bumpus v. Maynard, 38 Barb. 626.

[565] Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666.

Digitized by Google

merely." It does not include trinkets nor jewelry.[566] Cloth and trimmings purchased, and about to be used for the purpose of being made into clothing, are exempt as wearing apparel.[567] In those states where the exemption is confined by statute to necessary wearing apparel, the word "necessary" "is not to be understood in its most rigid sense, implying something indispensable, but as equivalent to convenient and comfortable. It would therefore include such articles of dress or clothing as might properly be considered among the necessaries, in contradistinction to the luxuries, of life. Whether an article attached is a necessary or a luxury may, under some circumstances, be a question for the jury, depending upon the situation of the debtor and the character and uses, and perhaps the cost, of the article." [568] "The wearing apparel 'necessary for immediate use' must be such an amount of clothing as is necessary to meet the varying climate and the customary habits and ordinary necessities of the mass of the people. The clothing worn by the individual while about his daily toil might be all that was necessary for the time, but be wholly insufficient when the labor ceased; and the clothing suitable and proper for days of labor might not be such as the common sentiment of the community would deem necessary for use on days set apart for religious assembling and worship." [569] Wearing apparel, as these words are used in the statutes, consists of clothing or garments. A watch is an article for which exemption has been claimed under

[566] Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666; Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726. Hence, a watch is not wearing apparel. Smith v. Rogers, 16 Ga. 479.

[567] Richardson v. Buswell, 10 Met. 506, 43 Am. Dec. 450.

[568] Towns v. Pratt, 33 N. H. 349, 66 Am. Dec. 726.

[569] Peverly v. Sayles, 10 N. H. 356.

Digitized by Google

various provisions of the statutes of exemption; thus it has been held to be exempt as necessary household furniture,[570] as a working tool,[571] and as wearing apparel.[572] We think the better rule is that it is not exempt in either capacity.[573] The question of the exemption of a watch from execution has recently been presented to the supreme court of South Dakota. It was at first claimed that a watch and chain might be exempt as household furniture. It appeared, however, that the particular watch and chain in question had been carried by the debtor for his own convenience, and it was hence held not to be exempt as household furniture, because it had not been used in or by the household, or for the benefit or comfort of the family.[574] Subsequently an exemption of the same watch and chain was claimed on the ground that they were exempt under a section of the Compiled Laws, absolutely exempting "all wearing apparel and clothing of the debtor and his family." The court, from the use of the two words "apparel and clothing," concluded that both were not intended to express the same meaning, and hence that in exempting apparel, the legislature intended to exempt something more than clothing. "Watches," said the court, "are as essential to the comfort and convenience of men in nearly all vocations as are hats or coats; in many they are absolute necessities. The same condition, in perhaps a less marked degree, prevailed when the statute under discussion

[570] Leavitt v. Metcalf, 2 Vt. 342, 19 Am. Dec. 718.

[571] Bitting v. Vandenburgh, 17 How. Pr. 80.

[572] Stewart v. McClung, 12 Or. 431, 53 Am. Rep. 374; In re Steele, 2 Flip. 324.

[573] Rothschild v. Boelter, 18 Minn. 362; Gooch v. Gooch, 33 Me. 535; Sawyer v. Sawyer's Heirs, 28 Vt. 251.

[574] Brown v. Edmonds, 5 S. D. 508.

Digitized by Google

was enacted. While the question is not free from difficulty, and one upon which courts may easily differ, we are inclined to hold that defendant's watch and chain were absolutely exempt as wearing apparel." [575]

§ 233. Provisions for Family Use, or for Feed for Stock.—Articles purchased and kept for sale cannot be exempted as provisions provided for family use, though the family had been supplied from them before the levy.[576] Corn on hand may be exempted as provisions, if it was kept with a view of being converted into food for the family.[577] It has been held that corn standing ungathered in the field is not exempt.[578] But this is contrary to the weight of the authorities. The only test is to inquire whether the articles claimed as exempt were provided and intended as provisions to support the family. If they were so provided, and are adapted to the purpose for which the debtor intends them, they are exempt, though they may exist in the form of vegetables yet to be dug from the soil, or of corn yet to be severed from the stalk.[579] As the object of the statute exempting from execution any article of food is to provide the debtor and his family with the means of living, it will be liberally construed and held applicable, though the food is not of the precise character or form designated in the statute. Thus, an exemp-

[575] Brown v. Edmonds, 8 S. D. 271, 59 Am. St. Rep. 762.

[576] State v. Conner, 73 Mo. 572; Bond v. Tucker, 65 N. H. 165; Nash v. Farrington, 4 Allen, 157; Robinett v. Doyle, 2 West. L. M. 585. It seems that property bought to sell is never exempt. Guptil v. McGee, 9 Kan. 30; O'Donnell v. Segar, 25 Mich. 367.

[577] Atkinson v. Gatcher, 23 Ark. 101.

[578] Donahue v. Steele, 2 West. L. J. 402.

[579] Mulligan v. Newton, 16 Gray, 211; Carpenter v. Herrington, 25 Wend. 370, 37 Am. Dec. 239.

Digitized by Google

tion of flour will be construed to include Indian corn meal.[580] An exemption of provisions will protect corn on the ear or in the shuck,[581] and an exemption of pork, slaughtered or on foot, will entitle the debtor to retain hogs in his possession and ownership sufficient to make the quantity of pork specified in the statute, though such hogs are of various sizes and ages, and hence not in the condition in which hogs are ordinarily put when it is expected to soon or at once turn them into pork.[582] These decisions are not in harmony with one in Georgia, in which, construing an exemption of provisions, it was said that this word, as used in the constitution and statute of the state, meant "something in a condition to be consumed as food, such as meal, flour, lard, meat, and articles of that kind—articles which need no change for cooking," and it was hence held that a milch cow was not exempt as provisions.[583] Starting vegetables to market, to sell or exchange them for other necessaries of life, is not a forfeiture of the right to hold them as exempt.[584]

Where the statute exempts necessary food for stock, what is necessary must be determined upon all the circumstances of the case. During the season for pasturing, no food may be exempt, if the stock is such that it should be kept by pasturing. Ordinarily, necessary food for stock is such an amount as will keep it until proper food may be realized from the productions of the ensuing crop-producing season.[585] Food for stock

[580] Lasaway v. Tucker, 15 N. Y. Supp. 490.
[581] Cochran v. Harvey, 88 Ga. 352.
[582] Byous v. Mount, 89 Tenn. 361.
[583] Wilson v. McMillan, 80 Ga. 733.
[584] Shaw v. Davis, 55 Barb. 389.
[585] Farrell v. Higley, Hill & D. 87.

Digitized by Google

is not allowed to a defendant unless he owns stock,[586] or unless he has the means with which he intends to buy it.[587] If an exemption is by statute allowed of provisions or food for the use either of the debtor and his family or of livestock owned by him and the amount of the exemption is not specified other than by the implication that the food or provisions shall be such only as are necessary, no test of any considerable value can be formulated for the purpose of determining whether the amount claimed is excessive or not. The question to be submitted to the court or jury is whether, under the circumstances, the food or provisions provided by the defendant and claimed as exempt are such as a provident man would ordinarily keep on hand. If so, they are exempt.[588]

§ 234. **Exemption of Wages, Earnings, etc.**—In most of the states the exemption laws have been amended at a comparatively recent period with a view of exempting some portion of the earnings of persons who do not carry on business on their own account, but merely as employés of others.[589] The rapid multiplication of great manufacturing, transportation, and other corporations, with the army of employés in the service of each, has attracted attention to the multitude of men, many of whom are householders, who have no tools or implements of their own to be exempted, and whose only means of support consists of the moneys due them

[586] King v. Moore, 10 Mich. 538. In Vermont the exemption of forage is understood to extend to a quantity sufficient to keep all the stock named in the statute as exempt, whether the debtor owns that amount of stock or not. Kimball v. Woodruff, 55 Vt. 229.

[587] Cowan v. Main, 24 Wis. 569.

[588] Ward v. Gibbs, 10 Tex. Civ. App. 287; Burris v. Booth (Tex. Civ. App.), 40 S. W. 186.

[589] Davis v. Meredith, 48 Mo. 263. See statutes on this subject collected in note 91 Am. Dec. 411.

Digitized by Google

from their employers at stated times for services rendered. The garnishment of these moneys left them and their families without any means of support. Hence, the enactment of divers statutes withdrawing such moneys, to a limited extent, from execution and attachment. The debt thus withdrawn is variously described as "wages, salaries, or compensation of laborers and employés for personal services," [590] "time wages of all laborers and mechanics," [591] seamen and sea-going fishermen's wages, and earnings of the judgment debtor for his personal services; [592] wages or earnings, [593] "earnings of judgment debtor for his personal services," [594] including wages due for the personal services of any minor child; "debt which has accrued by reason of personal services of the debtor," [595] and the entire amount of wages for the labor or services of any married woman or minor, "fifty per cent of the wages for labor or services of any person residing within the state," [596] "money due for personal labor or services," [597] "daily, weekly, or monthly wages of all journeymen, mechanics, and day laborers," [598] "wages and services," [599] "wages," [600] "earnings of a judg-

[590] Code Ala., 1886, § 2512.

[591] Ark. Dig. 1894, § 3497.

[592] Cal. C. C. P. 690, sub. 9, 10.

[593] Mills An. St. Colo. Sup. § 2567.

[594] Code N. C. 1885, vol. 1, § 493; Code Civ. Proc. Col. § 226; Gen. Laws Idaho, 1887, § 4480; Gen. Stat. Kan. 1897, vol. 2, p. 235, § 509; C. C. P. Mont. 1895, §1222; Gen. Laws Nev., 1885, § 3267; Code Civ. Pro. N. Y., 1895, § 2463; Hill's Gen. Laws Or., 1892, § 310; Code Civ. Pro. S. C., § 317; Rev. Stat. Ohio, 1896, § 5483.

[595] Pub. Stats. Conn., 1888, § 1231.

[596] Rev. Code Del., 1890, p. 841.

[597] Rev. Stat. Fla., 1891, § 2008.

[598] Code Ga., 1895, § 4732.

[599] Starr and Curtis' Ann. Stat. Ill., vol. 2. p. 2435, § 111.

[600] Rev. Stats. Ind., 1894, §§ 970, 971; Gen. Stats. Ky., 1894, § 1701; Rev. Stats. Mo., 1889, § 5220.

Digitized by Google

ment debtor for his personal services or those of his family,"[601] "wages or hire due to any laborer or employé,"[602] salary of an officer or wages or recompense for personal services of the debtor,[603] "money or credits which are due for the wages of the personal labor or services of defendant, or of his wife or minor children,"[604] and also the wages or pay due or accruing to any seaman,[605] wages of any person or of the minor children of any person,[606] "wages of every laborer or person working for wages,"[607] "wages of laborers, mechanics, and clerks,"[608] "personal earnings of the debtor,"[609] "wages of any laborer, or the salary of any person in private or public employment,"[610] "salary or wages of a debtor and his wife and minor children,"[611] "wages of mechanic or other laboring man,"[612] "current wages for personal services,"[613] "wages or compensation,"[614] "one-half of the earnings of the judgment debtor for his personal services, and all the earnings of any minor child of any debtor,"[615] "earnings of all married persons hav-

[601] Code of Iowa, 1897, § 4011; Rev. Stats. Me., 1883, tit. 9.
[602] Pub. Gen. Laws Md., ed. 1888, p. 77, § 32.
[603] Art. 1992, Voorhies' Civil Code La.
[604] Pub. Stats. Mass., 1887, p. 1054, §§ 29, 30; Gen. Laws N. H. 1878, c. 249, § 40; Howell's Ann. Stat. Mich., 1882, §§ 8032, 8096, 7091.
[605] Supp. to Pub. St. Mass. 1888, p. 410, chap. 194.
[606] Minn. Stats. 1894, c. 66, §§ 5314, 5491.
[607] Rev. Code Miss., 1892, c. 45, § 1963.
[608] Comp. Stats. Neb. 1897, § 6118; Wright v. C. B. & Q. R. R., 19 Neb. 175.
[609] Comp. Laws N. M., 1897, p. 467, § 1737.
[610] Pepper & Lewis' Dig. Pa., ed. 1896, vol. 1, p. 1946, § 63.
[611] Gen. Laws R. I., 1896, p. 888, § 2, subs. 10, 12 and 13.
[612] Milliken and Ventrees' Code Tenn., 1884, § 2931.
[613] Sayles' Tex. Civ. Stat., 1897, art. 2397.
[614] Rev. Laws Vt., 1880, § 1075.
[615] Rev. Stat. Utah, 1898, §§ 3243, 3241.

Digitized by Google

ing families dependent upon them for support,"[616] "current wages or salaries,"[617] and "earnings not exceeding one hundred dollars for each month of all residents who are married or who have to provide for a family."[618]

The amount of wages or earnings exempted varies in the different states. In some it must not exceed twenty-five dollars per month, in others it is for a designated number of days preceding the garnishment;[619] in others the time is not limited. In some of the states a necessity for the exemption must be shown;[620] while in others it need not. It will be observed that these statutes, while addressed to the accomplishment of substantially the same objects, vary in their phraseology. The exemption in some of them is said to be of wages, in others of earnings, and in still others of salary. In some the persons to whom the exemption applies are described as laborers, clerks, mechanics, etc. Where there is nothing to indicate the persons entitled to the exemption other than what is implied from the use of the words "wages," "earnings," or "salary," it is necessary to consider the meaning of these words, for a debt may be due the defendant in execution for something done by him, and yet such debt may not represent either wages, salary, or earnings, as these terms are employed in these statutes, and when the exemption is limited to mechanics or laboring men, it may be necessary to ascertain whether the claimant is either. Where the defendant is work-

[616] Laws Wis., 1889, § 2982.

[617] Ballinger's Codes and Stats. of Wash., ed. 1897, § 5412.

[618] Act of Congress, June 19, 1878.

[619] Haynes v. Hussey, 72 Me. 448; Cal. Code Civ. Proc., sec. 690; subd. 8; sec. 581, Code Neb.

[620] Zimmerman v. Franke, 34 Kan. 650.

Digitized by Google

ing for a salary, or where the money or debt sought to be subjected to execution is the result of the defendant's personal labor, unassisted by any other person or thing, there can be no doubt that he is entitled to the exemption, unless such exemption is conceded only to a particular class of persons to which the claimant does not belong. Thus, if the exemption is of earnings of the debtor for his personal services, a professional man, as a physician or school-teacher, is entitled to the exemption.[621] If, on the other hand, the exemption is given to laborers or mechanics, the claimant must show that he belongs to the class exempted. Whether a claimant is a laborer or mechanic may frequently admit of doubt. In Georgia it was held that overseers,[622] and shipping and receiving clerks,[623] and forwarding clerks,[624] and teachers,[625] were laborers. The correctness of these decisions was subsequently doubted, and the court refused a claim for exemption made by one who was the boss or director of an entire department of an extensive factory, authorized to employ and discharge hands, and who had under his supervision 150 men.[626] Courts may agree upon the general definition or description of a laborer, and yet differ as to whether a particular person is entitled to exemption, because of his occupation. Every character of work for compensation or for any other purpose, except that of pleas-

[621] McCoy v. Cornell, 40 Iowa, 457; Miller v. Hooper, 19 Hun. 394.

[622] Caraker v. Mathews, 25 Ga. 571; Russell v. Arnold, 25 Ga. 625.

[623] Butler v. Clark, 46 Ga. 466; Lamar v. Chisholm, 77 Ga. 306. These decisions are probably overruled in Hinton v. Goode, 73 Ga. 233; Oliver v. Macon H. Co., 98 Ga. 251, 58 Am. St. Rep. 300.

[624] Claghorn v. Saussy, 51 Ga. 576.

[625] Hightower v. Slaton, 54 Ga. 108, 21 Am. Rep. 273. Teachers are not regarded as laborers in Pennsylvania. Schwacke v. Langton, 12 Phila. 402.

[626] Kile v. Montgomery, 73 Ga. 343.

Digitized by Google

ure, may, without impropriety, be called labor, and the doer of it a laborer; but to give the latter word so comprehensive a signification in the statutes of exemption would be to deprive it of any meaning, or, more accurately speaking, to include within it all persons to whom any wages, earnings, or salary may be due. So it may appear that part of what the claimant is entitled to compensation for would, if standing alone, be properly regarded as the work of a laborer and the balance not, and then it is obvious, as the court cannot segregate his services and adjudge what part of the sum due to him is due to him as a laborer and what part in some other capacity, it must consider his employment as a whole, and determine whether it is chiefly that of a laborer or not. Thus where the questions involved were whether a clerk in a store and a civil engineer were entitled to exemption as laborers, and it appeared that each discharged some duties requiring manual labor, but that both were employed because they possessed and exercised some skill superior to that of an ordinary laborer, it was held that neither was entitled to the exemption, because, in the main, his services were "not such as depended upon physical power to do ordinary manual labor, but consisted principally of work requiring mental skill or business capacity and involving the exercise of his intellectual faculties."[627] In another state, where substantially the same views prevailed respecting the definition of a "laborer," it was, nevertheless, held that a clerk in a store might be entitled to an exemption of his wages or salary.[628] "The word 'laborer,' when used in its

[627] McPherson v. Stroup, 100 Ga. 228; Oliver v. Macon H. Co., 98 Ga. 249, 58 Am. St. Rep. 300.

[628] Williams v. Link, 64 Miss. 641.

Digitized by Google

ordinary and usual acceptation, carries with it the idea of actual physical and manual exertion or toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable physical labor, the contracts made with their employers."[629] Moneys due for services as commissioner in a partition suit,[630] or for salary as president of a railway company,[631] are not exempt as the wages of laborers or employés. On the other hand, mail carriers,[632] street car conductors,[633] locomotive engineers,[634] and stenographers,[635] have all been held to be entitled to exemption as laborers. A conductor on freight and pas-

[629] Farinholt v. Luckhard, 90 Va. 936, 44 Am. St. Rep. 953, Wildner v. Ferguson, 42 Minn. 112, 18 Am. St. Rep. 495. In this case the court said: "All men who earn compensation by labor or work of any kind, whether of the head or hands, including judges, lawyers, bankers, merchants, officers of corporations, and the like, are in some sense 'laboring men.' But they are not 'laboring men' in the popular sense of the term, when used to refer to a man's employment, and that is the sense in which we must presume the legislature used the term. In Wakefield v. Fargo, 90 N. Y. 213, under an act making stockholders in a corporation liable for debts due 'laborers, servants, and apprentices' for services performed for the corporation, the court construed the word 'laborers' to refer to those whose services are manual or menial, those who are responsible for no independent action, but who do a day's work or stated job under the direction of a superior, and held that it did not include one who kept the accounts of receipts and disbursements, and, in the absence of the superintendent, had charge and control of the business." It was nevertheless determined in Abrahams v. Anderson, 80 Ga. 570, 12 Am. St. Rep. 274, that the salary of a private secretary, amounting to one hundred and twenty-five dollars a month, was exempt as wages.

[630] State v. Cobb, 4 Lea, 481; South & N. A. R. R. Co. v. Falkner, 49 Ala. 115.

[631] South & N. A. R. R. Co. v. Falkner, 49 Ala. 115.

[632] Farinholt v. Luckhard, 90 Va. 936, 44 Am. St. Rep. 953.

[633] Frutchey v. Lutz, 167 Pa. St. 337.

[634] Sanner v. Shivers, 76 Ga. 335.

[635] Abrahams v. Anderson, 80 Ga. 570, 12 Am. St. Rep. 274.

Digitized by Google

senger trains of railways has been held not to be entitled to the benefit of a statute exempting from execution the wages of a journeyman, mechanic, or day laborer, on the ground that, though he may perform manual labor, he is not employed for that purpose, "rather than on account of his skill or intellectual qualifications to discharge important functions in overlooking and directing the operations of others engaged in running and managing the train of their common employer."[636] With respect to commercial travelers or persons selling goods by sample, whether their compensation is in the form of salary, wages, or commissions, the courts are unable to agree, some denying,[637] and others affirming,[638] their right to exemption. Whether the amount due is for wages or personal services may also be questionable. The claimant may have used his capital or that of others, or may have employed assistants, or labored with the aid of his team. In either case, the moneys realized are not solely the fruits of his personal labor. In Pennsylvania, the "wages of laborers" were exempt from attachment. One Chave contracted to grade and excavate a street. In performing his contract he employed two carts, two or three horses, "and enough of hands, with himself, to keep these in exercise." The supreme court of the state, being required to decide whether moneys due under this contract were wages, within the meaning of the statutes, gave its opinion as follows: "The act was, doubtless, intended to protect and secure to the laborer

[636] Miller v. Dugas, 77 Ga. 386, 4 Am. St. Rep. 90.

[637] Wildner v. Ferguson, 42 Minn. 112, 18 Am. St. Rep. 494; Brisco v. Montgomery, 93 Ga. 602, 44 Am. St. Rep. 192.

[638] Deering v. Ruffner, 32 Neb. 845, 29 Am. St. Rep. 473; Hamberger v. Marcus, 157 Pa. St. 133, 37 Am. St. Rep. 719.

Digitized by Google

what was earned by his own hands. 'Muzzle not the ox which treadeth out the corn.' It was not designed to protect the contracts of those who speculate upon or make profit out of the labor of others. The term 'labor,' to be sure, is of very extensive signification. The merchant labors, for there is mental as well as manual or corporeal labor; the farmer labors, the professional man labors, and judges labor, as every member of this court can testify. But it is this very capability of enlarged extension which produces the necessity to circumscribe and limit the word as used in the statute, in order to accomplish what we believe must have been the intent of the legislature. That is, to secure to the manual laborer, by profession and occupation, the fruits of his own work for the subsistence of himself and family. If it is extended to the contractor who employs others, we would by that construction prevent the actual laborer, who earned the money, from attaching it to secure the wages of his labor, and his reward. We believe that, by confining the exemption from attachment to the actual reward or wages earned by the hands and labor of the individual himself, and his family under his direction, we best accomplish the beneficial design of the legislature." [639] But the doctrines of this case were certainly modified, and to a great extent overruled, in the subsequent case of Pennsylvania Coal Co. v. Costello.[640] Kennedy was a miner by profession. He contracted to mine coal at a fixed rate per ton, and in executing his contract employed a common laborer to assist him. A sum of money due from the coal company to Kennedy under this contract was gar-

[639] Heebner v. Chave, 5 Pa. St. 115. See also Smith v. Brooke, 49 Pa. St. 147.

[640] 33 Pa. St. 241.

Digitized by Google

nished by Costello. This sum was shown to represent the wages or profits due to Kennedy after paying his laborer. It was therefore held to be exempt. "The labor of the miners is as truly labor as that of the subordinate whom they employ, and their earnings as truly wages as are his. If the proviso would protect his earnings from seizure, it must be held to protect the earnings of the miners. Any other construction would embarrass a large and productive branch of industry, which doubtless has adjusted itself in the best form for both employer and employé, and would also discriminate unfairly against the most meritorious class of laborers."[641] Possibly there are employments in which it is the common course of business for a laborer to supply a helper or assistant, and in which he is, nevertheless, not to be regarded as a contractor, and when the compensation earned by him may be exempt as wages, though it includes his charge for his helper. If, however, the business may fairly be regarded as that of a contractor, as where one is to furnish material, or to do work necessary for the building of a house,[642] or for manufacturing brick,[643] the moneys to which he becomes entitled are not wages. This is also true when one carries on any business in which he employs clerks and other assistants, and is dependent for his compensation upon the profits which he may realize.[644] The term "wages" also includes the idea not merely of one person working for another, but also that he shall work under the direction of the latter, and not as an independent contractor.[645] Thus, a blacksmith, shoe-

[641] Pennsylvania Coal Co. v. Costello, 33 Pa. St. 241.
[642] Heard v. Crum, 73 Miss. 157, 55 Am. St. Rep. 520.
[643] Henderson v. Nott, 36 Neb. 154, 38 Am. St. Rep. 720.
[644] Mulford v. Gibbs, 9 App. Div. 490.
[645] Fox v. McClay, 48 Neb. 820.

Digitized by Google

maker, tailor, or saloon-keeper, who serves his customers and charges them therefor, whether his services include the furnishing of materials or not, is not an earner of wages, and the moneys due him are not exempt as such.[646]

The mode of payment is not material in considering whether a sum due is wages. If one person is hired to work for, and under the direction of, another at any manual labor, the compensation to be paid therefor is wages, whether it be in the form of a commission upon a sum realized or produced, or measured by the amount of work done. "The word 'wages' means the compensation paid to a hired person for his services. This compensation to the laborer may be a specified sum for a given time of service or a fixed sum for a specified piece of work—that is, payment may be by the job. The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in the service, but it may also be determined by the work done. 'Wages' means compensation estimated in either way."[647]

In some of the states the exemption is of "current wages." So far as we can ascertain, these terms have been but little considered, and no judicial definition of them has yet been attempted. Probably the theory of the statute was that laborers expended their wages at or about the time the payment thereof was made or became due, and that the effect of the exemption laws should be such as to permit the retention of wages so that they might be devoted to the payment of the neces-

[646] Tatum v. Zachry, 86 Ga. 573; Prince v. Brett, 47 N. Y. Supp. 402; Telles v. Lynde, 47 Fed. Rep. 912.

[647] Ford v. St. Louis Ry. Co., 54 Ia. 728; Hamberger v. Marcus, 157 Pa. St. 133, 37 Am. St. Rep. 719; Adcock v. Smith, 97 Tenn. 373, 56 Am. St. Rep. 812; Swift M. Co. v. Henderson, 90 Ga. 136.

Digitized by Google

sary expenses of the debtor or his family at or about the time they were earned. It has, hence, been held, where the salary of the debtor was two hundred dollars per month, and he permitted it to accumulate and remain in the hands of his employer until a sum was due representing something more than three months' salary, that such sum was not exempt as current wages.[648]

Between the terms "wages" and "salary" there is no material difference when they are applied to the subject here under consideration. The former term is commonly used to denote the compensation of laborers, and the latter that of other persons of more permanent employment and more elevated stations. The term "earnings" is more comprehensive than either of the others. It implies, as do they, that the sum due shall be claimed for the personal services of the claimant, and that it shall not include, to any substantial extent, recompense for materials furnished; but earnings need not result from work done under the direction of another, nor from manual labor. Thus compensation due to a professional man for his services is earnings.[649] To some extent earnings which are exempt from execution need not be solely the result of personal services. Thus, if an artist agrees to paint a portrait and to furnish the canvas, paint, and other materials necessary thereto for a compensation in gross, and the value of the articles so furnished is insignificant in comparison with the whole price to be paid for the portrait, the whole is exempt as earnings.[650] In Wisconsin, a judgment debtor was employed by merchants to inspect

[648] Bell v. Indian L. Co. (Tex.), 11 S. W. 344.

[649] McCoy v. Connell, 40 Ia. 457; Millington v. Laurer, 89 Ia. 322, 48 Am. St. Rep. 385; Moran v. Darcy, 31 N. Y. Supp. 1130.

[650] Millington v. Laurer, 89 Ia. 322, 48 Am. St. Rep. 385.

Digitized by Google

flour, and was paid a specified price for each barrel. He inspected daily himself, passing upon every sample, and employed a deputy, a book-keeper, and a laborer. His net income was about two thousand five hundred dollars per annum, and was held to be his earnings within the meaning of the exemption statute.[651] In another case in the same state, the word "earnings" was held to protect all that the debtor made by the assistance of his team and other exempt property.[652] Where one is employed to superintend work being done under a contract, for which he is paid, as a commission for his services, a certain percentage of the total cost of the work, the amount to become due him is exempt from execution as earnings or wages.[653] Notwithstanding these decisions, we do not understand that the term "earnings" is synonymous with that of profits, nor that it includes all sums which may become due to the defendant, resulting, in part, from his personal services. If he carries on a mercantile or manufacturing business, or contracts for the building of houses, or for the doing of like work involving the use of capital and the employment of others, in which it is impossible to determine what proportion of the sum due, or to become due, represents his personal services, and what proportion the profits of capital or of the labor of others, neither the whole nor any part can be exempt as earnings. Hence, moneys due from boarders, to the keeper of a boarding-house, who rents the house, furnishes the necessary furniture and provisions, employs the servants, and renders them personal assist-

[651] Brown v. Hebard, 20 Wis. 326, 91 Am. Dec. 408.

[652] Kuntz v. Kinney, 33 Wis. 510.

[653] Moore v. Heaney, 14 Md. 558; Howell v. McDowell, 1 Atl. Rep. 474. Moneys due a subcontractor, who has furnished no capital, are exempt as earnings. Banks v. Rodenbach, 54 Iowa, 695.

Digitized by Google

ance, are not exempt as earnings for personal services.[654]

In Nebraska, one section of the code declared that no property should be exempt from execution for laborers' wages, while another section, subsequently adopted, provided for the exemption from execution of the wages of mechanics, clerks, and laborers, while in the hands of their employers; and then the courts were confronted with a question which the legislature had overlooked, to wit: In an action to recover wages due the plaintiff as a laborer, may he subject to execution wages due the defendant, also a laborer? In this instance the court was able to solve the question by giving precedence to the section exempting laborers' wages, on the ground that, being enacted after the other section, it was the later expression of the legislative will.[655] In the same state it has been held that the exemption may be claimed at any time prior to the actual payment of the money by the garnishee; that though judgment has been entered against him, if he was at the time not aware that the debt attached was exempt, either he or the judgment debtor may thereafter call the attention of the court to the exemption, and thereby rescue the debt from execution.[656]

The exemption of wages and earnings is intended to be not formal, but substantial and beneficial, and hence, to defeat any attempt, whether direct or indirect, to apply them to the satisfaction of the debtor's obligations against his will. Therefore, they cannot, when exempt, be subject to garnishment or any other compulsory proceeding, to appropriate them to the sat-

[654] Shelly v. Smith, 59 Iowa, 455; Youst v. Willis, 5 Okla. 170.
[655] Snyder v. Brune, 22 Neb. 189.
[656] Union Pac. R'y v. Smersh, 22 Neb. 751, 3 Am. St. Rep. 290.

Digitized by Google

isfaction of a creditor's demand.[657] The voluntary payment to a sheriff by an employer, when garnished, of wages due his employé, cannot render the amount so paid subject to execution either in that or any other action.[658] It is not necessary that the wages of the claimant remain either in his hands or those of his debtor. He may authorize another to collect them for him. In the hands of the latter they remain exempt from execution and cannot be garnished.[659] A judgment recovered for exempt wages is itself exempt.[660] The better rule is, that as long as the wages can be identified, they are exempt, and, hence, that the right of exemption is not lost by their deposit in a bank after their collection.[661] In Maine and Massachusetts, these views do not prevail, and wages collected by an attorney for his client are not exempt from execution, though exempt before such collection.[662]

If wages were subject to garnishment they could not be attached before they became due, and this would remain true, although the employer had accepted an order for them drawn by the employé.[663] Nor, though by the contract of employment, wages are payable at stated times in advance, can any garnishment of them be effected until the services have been performed.[664] If payment is made in advance, the moneys cannot be subjected to execution.[665] If an employé is wrongfully

[657] Chapman v. Berry, 75 Miss. 437, 55 Am. St. Rep. 546; Union P. R. Co. v. Smersh, 22 Neb. 751, 3 Am. St. Rep. 290.

[658] Cox v. Bearden, 84 Ga. 304, 20 Am. St. Rep. 359.

[659] Elliott v. Hall, 2 Idaho, 1142, 35 Am. St. Rep. 285.

[660] Steele v. McKerrihan, 172 Pa. St. 280.

[661] Rutter v. Shumway, 16 Colo. 95.

[662] Ayer v. Brown, 77 Me. 195; Cook v. Holbrook, 6 Allen, 572.

[663] Allen v. Pickett, 61 N. H. 641.

[664] Archer v. People's S. B., 88 Ala. 249.

[665] Boyd v. Brown, 120 Ind. 393; Reinhart v. Empire S. Co., 37 Mo. App. 24.

Digitized by Google

discharged before his period of employment expires and recovers damages therefor, the amount so recovered is exempt.[666]

§ 234 a. Pensions.—Section 4747 of the Revised Statutes of the United States declares that "no sums of money due, or to become due, to any pensioner shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." This section, so far as we can ascertain, has never been the subject of judicial consideration and decision in the national courts. Its language is not well chosen. Hence, different views have been entertained respecting it in the state courts. As construed by the majority of them, it can have little or no efficiency in protecting from execution the moneys derived by a pensioner from his pension, for they are commonly understood to be exempt from execution only while in course of transmission to him. After they are received by him, they seem to be subject to execution to the same extent as any other of his moneys, and, though they are invested in other property, and even in the necessities of life, such investments are not exempt from execution unless made so by the state statutes.[667] In some of the states it has been held

[666] Cox v. Bearden, 84 Ga. 364, 20 Am. St. Rep. 359.

[667] Price v. Society of Savings, 64 Conn. 362, 42 Am. St. Rep. 198; Cavanaugh v. Smith, 84 Ind. 380; Webb v. Holt, 57 Ia. 712; Faurote v. Carr, 108 Ind. 123, since overruled; Cranz v. White, 27 Kan. 319, 41 Am. Rep. 408; Johnson v. Elkins, 90 Ky. 163; Robion v. Walker, 82 Ky. 60, 56 Am. Rep. 878; Friend v. Garcelon, 77 Me. 25, 52 Am. Rep. 739; Spellman v. Aldrich, 126 Mass. 113; Jardain v. Saving

Digitized by Google

that if the pensioner endorses to his wife a check received for pension money, to enable her to therewith purchase land, and she does purchase it, and takes a conveyance in her own name, the property so purchased cannot be seized or sold for the satisfaction of his debts.[668] If a bank is made a collecting agency for the purpose of collecting a pension check, and it is, when collected, deposited to the credit of the pensioner in the bank, it has been held exempt from execution on the ground that the moneys had not been received by him, or, in other words, were, within the meaning of the statute, in course of transmission to him.[669] The last clause in the statute exempting pension moneys from execution, declaring that they shall inure wholly to the benefit of the pensioner, indicates an intention on the part of Congress to give the pensioner some substantial benefit from the statute, or, in other words, to entitle him not only to receive, but also to hold, the proceeds of his pension exempt from execution, and even to make investments thereof, and to hold such investments as exempt. This view prevails in a few of the state courts.[670] It has recently been adopted by the supreme court of Iowa, which, in adopting it, overruled some of its earlier decisions and approved the dissenting opinion of Judge Beck in Foster v. Byrne, 76 Ia. 298. In this opinion he showed that, under the decisions of the national courts, independently of § 4747 of the Revised Statutes of the United States, it would not have been possible to subject to execution moneys re-

Fund Assn., 44 N. J. L. 376; Rozelle v. Rhodes, 116 Pa. St. 129, 2 Am. St. Rep. 591; Payne v. Gibson, 5 Lea, 173.

[668] Marquardt v. Mason, 87 Ia. 136; Holmes v. Tallada, 125 Pa. St. 133, 11 Am. St. Rep. 880.

[669] Reff v. Mack, 160 Pa. St. 265, 40 Am. St. Rep. 720.

[670] Hayward v. Clark, 50 Vt. 612; Folschow v. Werner, 51 Wis. 85.

Digitized by Google

sulting from a pension until they had been actually paid to the pensioner, because so long as the money remained in the hands of the disbursing officer of the government, it was the money of the latter, and it was not, until it was paid over to the person entitled to receive it, that it could be considered any part of his effects. The judge claimed that the object of the exemption statute was to do more than to declare the law as previously existing, and that its additional object must have been the exempting of the moneys of the pensioner from execution, even after they had been received by him; and the court in the latter decision said: "It is sufficient to say, that if force and effect is to be given to that clause of the act of Congress which provides that pension money 'shall inure wholly to the benefit of the pensioner,' to the exclusion of his creditors, there appears to us to be no escape from the conclusion that the property purchased with pension money is exempt. Any other construction of the law would permit creditors to subject the money as soon as it reaches the hands of the pensioner."[671] In this state, though land purchased with pension money is held to be exempt, the exemption does not extend to the crops raised thereon.[672]

In several of the states the legislation of Congress upon the subject has been supplemented by statutes exempting from execution moneys derived from a pension after their receipt by the pensioner. These statutes are liberally construed in his favor, so as to give him the complete benefit of his exemption, by holding that it continues, though the moneys have been entrusted by

[671] Crow v. Brown, 84 Ia. 344, 25 Am. St. Rep. 501; Smith v. Hill, 83 Ia. 684, 32 Am. St. Rep. 329; Marquardt v. Mason, 87 Ia. 136.

[672] Haefer v. Mullison, 90 Ia. 373, 48 Am. St. Rep. 451.

Digitized by Google

him to another for safekeeping, or have been deposited in a bank, and, further, that the exemption generally protects property purchased with the proceeds of a pension.[673]

§ 234 b. Insurance—Life Policies and Their Proceeds. In many of the states, statutes have been enacted, at a comparatively recent period, exempting from execution policies of insurance on the life of a debtor, or moneys received therefrom. The statutes of California purport to exempt "all moneys, benefits, privileges, or immunities accruing, or in any manner growing out of, any life insurance on the life of the debtor, if the annual premiums do not exceed five hundred dollars."[674] In Illinois, "the money or benefit provided or rendered by any corporation authorized to do business under" the act respecting accident insurance corporations "shall not be liable to attachment by garnishee or other process, and shall not be seized, taken, appropriated, or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a policy or certificate holder, or any beneficiary named therein."[675] In Iowa, a policy of insurance on the life of an individual, in the absence of an agreement to the contrary, inures to the separate use of the husband or wife and children of such individual, independently of his or her creditors, and the avails of all policies of in-

[673] Price v. Society of Savings, 64 Conn. 362, 42 Am. St. Rep. 198; Diamond v. Palmer, 78 Ia. 578; Dean v. Clark, 81 Ia. 753; Smith v. Hill, 83 Ia. 684, 32 Am. St. Rep. 329; Yates Co. N. B. v. Carpenter, 116 N. Y. 550, 16 Am. St. Rep. 855; Burgett v. Fancher, 35 Hun, 647; Stockwell v. National Bank, 36 Hun, 583; Countryman v Countryman, 28 N. Y. Supp. 258; Fritz v. Worden, 46 N. Y. Supp. 1040.

[674] C. C. P. Cal., § 690, sub. 11.

[675] Starr & Curtis' St. Ill., 1896, p. 2277, § 249.

Digitized by Google

surance on the life of any individual, payable to his surviving widow, shall be exempt from liability for all debts of such beneficiary contracted prior to the death of the assured, provided that in any case the total exemption for the benefit of any one person shall not exceed five thousand dollars.[676] In Maine, "life and accident policies and the money due thereon are exempt from attachment and from all claims of creditors during the life of the insured, when the actual cash premium does not exceed one hundred and fifty dollars; but when it exceeds that sum, and the premium was paid by the debtor, his creditors have a lien on the policies for such sum in excess of one hundred and fifty dollars a year as the debtor has paid for two years, subject to any pledge or assignment made thereof in good faith."[677] The statutes of Massachusetts relating to assessment insurance provide that the "money or other benefit, charity, relief, or aid to be paid, provided, or rendered by any corporation authorized to do business under this act, shall not be liable to attachment by trustee or other process, and shall not be seized, taken, appropriated, or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a policy or certificate holder, or any beneficiary thereof."[678] In Mississippi, "the proceeds of a life insurance policy to an amount not exceeding ten thousand dollars upon any one life, shall inure to the party or parties named as beneficiaries, free from all liability for the debts of the person whose life was insured, even though such person pay the premiums thereon," and "the proceeds of a life insurance policy not exceeding

[676] Murdy v. Sykes, 101 Ia. 549, 63 Am. St. Rep. 411.
[677] St. Me., ed. 1883, ch. 49, § 94.
[678] Supp. Pub. St. Mass., 1888-1895, p. 30, § 23, p. 1064, § 14.

Digitized by Google

five thousand dollars, payable to the executor or administrator of the insured, shall inure to the heirs or legatees freed from all liability for the debts of the decedent, but if the life of the deceased be insured for the benefit of his heirs or legatees at the time of his death otherwise, and they shall collect the same, the sum collected shall be deducted from the five thousand dollars, and the excess of the latter only shall be exempt."[679] In New Mexico, "any beneficiary fund not exceeding five thousand dollars, set apart, appropriated, or paid by any benevolent association or society, according to its rules, regulations, or by-laws, to the family of any deceased member, or to any member of such family, shall not be liable to be taken by any process or proceedings, legal or equitable, to pay any debts of such deceased member."[680] In New York, "money or other benefit, charity, relief, or aid to be paid, provided, or rendered" by a life or casualty corporation, association, or society upon the co-operative or assessment plan "shall be exempt from execution, and shall not be liable to be seized, taken, or appropriated by any legal or equitable process, to pay any debt or liability of a member or widow of a deceased member of such corporation designated as the beneficiary thereof."[681] The exemption in Utah is expressed in substantially the same language as that of California. In Washington the proceeds or avails of all life and accident insurance are exempt from all liability for any debt.[682] In Wisconsin, a married woman may cause to be insured for her use the life of her husband, son, or other person, and any

[679] Code Miss. §§ 1964, 1965.
[680] Comp. Laws, New Mex., 1897, § 1741.
[681] Rev. St. N. Y., 1896, p. 1219, § 212.
[682] Wash. St., 1897, p. 70.

Digitized by Google

person effecting an insurance on his own life or that of another may cause the policy to be assigned to a married woman, or for her benefit. Such policies shall be free from the claims of her husband and of the person effecting or assigning such insurance, and their respective representatives and creditors, but if the annual premium exceeds one hundred and fifty dollars and is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid in excess of such sum, with interest, shall inure to the benefit of such creditors.[683]

Doubtless there are provisions in the statutes of the majority of the states exempting from execution either life insurance policies or their proceeds, or the proceeds of membership certificates in various societies and corporations undertaking to pay sums of money to a beneficiary upon the decease of a member thereof. These various statutes have, however, been rarely subject to judicial discussion respecting their exemption features. Two questions, each involved in some doubt from the language of the statute to be construed, have been presented and considered. The first is, does the exemption exist only against the debts of the person whose life was insured, or who paid the premium or other charge requisite to procure and keep the insurance in force, or does such exemption continue after his death in favor of the beneficiary or the person to whom the insurance is paid? and second, when insurance is exempted, if the annual premium exceeds the amount specified in the statute, what exemption, if any, exists where the annual premium is in excess of that amount?

[683] Sanborn v. Berryman's Sts., Wis., p. 1361, § 2347.

Digitized by Google

In Kentucky and Minnesota the statutes declare that certain moneys, benefits, charities, reliefs, or aids provided or rendered by the corporations therein designated "shall be exempt from execution, and shall not be liable to be seized, taken, or appropriated by any legal or equitable process, to pay any debt or liability of a member." If these statutes stopped with the words "exempt from execution," there would be no doubt of the exemption in favor of the beneficiary, but the additional words in the statute indicate that the legislature had in mind merely the debts or other liabilities of members of the association in question, and hence that, after the benefit was received by a person other than a member, it would be subject to the usual laws relating to executions. In both states, however, the conclusion has been reached that the fund or relief is exempt from execution, whether against the original member or against any beneficiary who has been paid, or is entitled to be paid, any benefit falling within the class described in the statute.[684] The decisions just cited are, we think, opposed to the weight of authority upon the subject. Under statutes very similar to those considered in Kentucky and Minnesota, though the question has never been presented to the court of appeals, the supreme courts of the state of New York have held that the exemption existed only as against the debts of the persons specifically named in the statute, and hence, that an execution against a beneficiary might reach his interest, unless the statute had ex-

[684] Schillinger v. Boes, 85 Ky. 357; Brown v. Balfour, 46 Minn. 68; In re How, 61 Minn. 217; First N. B. v. How, 65 Minn. 187; Gen. St. Minn., 1894, § 3312.

Digitized by Google

pressly exempted it from execution.[685] The code of Iowa provides that a "policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall enure to the separate use of the husband or wife and children of the said individual independently of his or her creditors, and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liability for any of his or her debts." A man effected an insurance upon his own life for the benefit of his wife. After his death a judgment was recovered against her, and the insurance garnished. She claimed it to be exempt, but the court said that it could be readily seen from the statute that "the exemption provided extends only to the debts of the party insured—not to the one receiving the money, or the husband or wife of the one upon whose life the policy was issued."[686] The statute of Massachusetts is similar to that of Iowa, and declares that if a policy is obtained by a husband on his life for the benefit of his wife, it shall enure to her separate use and benefit, and that of her children, independently of her husband or his creditors. A wife for whose benefit insurance was effected delivered the policy without assignment to one of her creditors; and it was insisted that the effect of this statute was such that in no event could the policy be made subject to the payment of her debts as against the interest of her children, but the court said: "The statute contains no clause exempting this property from liability to be applied by her, or by the law, to the payment of her own debts," and further, that

[685] Bolt v. Kehoe, 30 Hun, 619; Crosby v. Stephan, 32 Hun, 478; Millington v. Fox, 13 N. Y. Supp. 334; Commercial T. Assn. v. Newkirk, 16 N. Y. Supp. 177.

[686] Smedley v. Felt, 43 Ia. 607; Murray v. Wells, 53 Ia. 256; Mundy v. Sykes, 101 Ia. 549, 63 Am. St. Rep. 411.

Digitized by Google

"the entire interest being in the wife absolutely, it is liable to her debts." [687]

In Mississippi a life insurance policy not exceeding ten thousand dollars enures to the party named as beneficiary freed from all liability for the debts of the person paying premiums thereon. If the beneficiary himself pays the premiums, he cannot claim the benefit of the exemption. "There is nothing indicating that the proceeds of such policy in the hands of the beneficiary shall be held to be enjoyed by him in any other manner than other property may be held or freed from any liability to which other property may be subjected. The exemption is not to the beneficiary as against his creditors, because he had paid the premium. The statute forbids the proceeds which are his by the contract of insurance from being subjected to the debts of him who has paid the consideration on which the contract of insurance rests because of such payments having been made. When the beneficiary has paid the premiums, and the proceeds of the insurance are sought to be subjected to his debts, the statute has no application." [688]

So far as we know, no courts other than those of California have had presented to them for consideration a claim of exemption under a policy of insurance the premium of which exceeded that designated in the statute. Of course, the claim was, that though the whole of the proceeds of the insurance could not be retained as exempt, yet that the court would consider what part thereof could have been obtained for the premium designated in the statute, and hold the remainder only subject to the claims of creditors. The court, however,

[687] Morris v. Massachusetts I. Co., 131 Mass. 294.
[688] Yale v. McLaurin, 66 Miss. 461.

Digitized by Google

held upon reasoning, which to us seems by no means conclusive, that to permit any exemption out of the proceeds of the policy, the premium of which exceeded that designated in the statute, would be to defeat a clear legislative intent by judicial legislation, that the statute in question was too clear for construction, that it "simply says that the moneys accruing upon an insurance policy issued upon the life of the judgment debtor are exempt if the annual premiums paid do not exceed five hundred dollars. It is as plainly said that if the annual premiums do exceed five hundred dollars, no part of the same is exempt, as though it had been so added in words. And, besides, we do not expect to find in such a statute negative words, for nothing is exempt save what is expressly made so, and when a statute gives a list of exempt property, it expressly provides that no other property is exempt. To construe an unambiguous statute is an attempt to defeat the express legislative will, and not to ascertain it." [689]

§ 235. Proceeds of Exempt Property.—Property which the statute designates as exempt may be exchanged for or converted into property not exempt. This may be done either by the act of the debtor, or without his act and against his consent. Where a debtor voluntarily parts with the ownership of exempt property, and acquires in lieu thereof property not exempt, he, no doubt, waives his right to the benefit of the exemption law; or, more properly speaking, any article which the statute has failed to include in the list of exempt property cannot be placed in such list by proving that it has been obtained by the voluntary sale

[689] Estate of Brown, 123 Cal. 399, 69 Am. St. Rep. 74.

Digitized by Google

or exchange of exempt property.[690] Debts due,[691] or moneys[692] realized from a voluntary sale of exempt property, are subject to execution. An exception to this rule exists in Georgia, as the result of a very peculiar feature in the exemption laws of that state. There it appears that, on taking the requisite proceedings, the debtor may have certain property segregated and set apart to him as exempt. This property need not remain in specie to retain its exemption. The debtor may use it for any proper purpose, may exchange it for other property, may sell it and make purchases with the proceeds, may increase it by the ordinary process of growth or reproduction, and whatever may be obtained in lieu of it, or added to it as growth, increase, or profits, is exempt.[693] The original amount set apart as exempt may therefore be augmented by the frugality and business capacity of the defendant to an unlimited extent. The property set apart as exempt is like a trust estate, and neither the original nor anything proceeding therefrom is subject to execution. In Wisconsin the statute in express terms permits a debtor to sell and convey his homestead without subjecting it to the demands of his creditors. The proceeds of such sale retain their exempt character, while the debtor in

[690] Harrier v. Fassett, 56 Iowa, 264; Lloyd v. Durham, 1 Winst. 288; Connell v. Fisk, 54 Vt. 381; Wygant v. Smith, 2 Lans. 185; Friedlander v. Mahoney, 31 Iowa, 311; Pool v. Reid, 15 Ala. 826, Dortch v. Benton, 98 N. C. 190, 2 Am. St. Rep. 331.

[691] Scott v. Brigham, 27 Vt. 561; Edson v. Trask, 22 Vt. 18; Harrier v. Fassett, 56 Ia. 264.

[692] Charles v. Oatman, 4 Pa. L. J. 239; Knabb v. Drake, 23 Pa. St. 489, 62 Am. Dec. 352; Roundy v. Converse, 71 Wis. 524, 5 Am. St. Rep. 240; Mann v. Kelsey, 71 Tex. 609, 10 Am. St. Rep. 800.

[693] Morris v. Tennent, 56 Ga. 577; Wade v. Weslow, 62 Ga. 562; Johnson v. Franklin, 63 Ga. 378; Dodd v. Thompson, 63 Ga. 393; Kupferman v. Buckholts, 73 Ga. 778; King v. Skellie, 79 Ga. 147.

Digitized by Google

good faith intends with them to procure another homestead.[694] Whether a debtor who has sold exempt personal property can claim the proceeds as exempt on the ground that the sale was made for the purpose of reinvesting in other exempt property, and that this purpose is still entertained, and will be accomplished if he is allowed a reasonable opportunity, is a question which, so far as we are aware, has been but once decided by a court of last resort. The opinion was brief and inconclusive, but the result reached was, that the exemption could be maintained.[695]

Where the exemption law, instead of specifying certain property, exempts property to the extent of one thousand dollars, or of some other specified value, the fact that the debtor exchanges his property, or sells it and buys other property, does not prejudice his claim for exemption;[696] for, under such a law, all property is equally exempt, the only test being that of value.

In Iowa, if the owner of a homestead exchanges or sells it, and procures another with the proceeds, the right of exemption attaches to the new homestead.[697] The same rule prevails in Texas, and probably moneys realized from the voluntary sale of a homestead remain exempt from execution in that state until there has been a reasonable opportunity for their reinvestment.[698] But as a general rule, we think that it must be held, in the absence of any statutory provision to the contrary, that the voluntary sale of a homestead by a husband and wife is a complete extinguishment of

[694] Watkins v. Blatschinski, 40 Wis. 347.

[695] Cullen v. Harris, 111 Mich. 20, 66 Am. St. Rep. 380.

[696] Brewer v. Granger, 45 Ala. 580.

[697] Pearson v. Minturn, 18 Iowa, 36; Furman v. Dewell, 35 Iowa, 170; Sargent v. Chubbuck, 19 Iowa, 37; Marshall v. Ruddock, 28 Iowa, 487.

[698] Schneider v. Bray, 59 Tex. 670; Watkins v. Davis, 61 Tex. 414.

Digitized by Google

the homestead right, and that the proceeds of the sale, until invested in other exempt property, are subject to execution. In many instances, the homestead is of greater value than the law will protect from execution. In such a case, it must happen, when a creditor seeks satisfaction out of the homestead, either that the property be partitioned, and the debtor's part set off to him, and the balance sold, or that the whole be sold, and the proceeds paid to the debtor to the extent of his exemption rights, and the balance applied to the satisfaction of the debt. When the homestead is thus converted into money by acts over which the defendant has no control, the proceeds belonging to the debtor continue to be exempt from execution, either for some period designated by statute, or until he has for an unreasonable time failed to invest them in another homestead.[699] There is, so far as we know, no dissent from the proposition that no part of a homestead can become subject to execution through an act to which the claimant did not consent, and with which he is not chargeable. Thus, if it, or some part of it, is subjected to condemnation proceedings, and the claimant is compelled to part therewith upon being paid therefor, the moneys, when received, partake of the homestead character, so far as to be exempt from execution.[700] If a building comprising part of a homestead be destroyed by fire or detached from the realty by the wrongful act of another, entitling the owner to recover damages therefor, the cause of action and the judgment and

[699] Walsh v. Horine, 36 Ill. 238; Mitchell v. Milhoan, 11 Kan. 628; Dearing v. Thomas, 25 Ga. 223; Keyes v. Rines, 37 Vt. 260, 86 Am. Dec. 707; Maxey v. Loyal, 38 Ga. 531; Morgan v. Stearns, 41 Vt. 398; Fogg v. Fogg, 40 N. H. 282, 77 Am. Dec. 715; Pittsfield Bank v. Howk, 4 Allen, 347.

[700] Brooks v. Collins, 11 Bush, 622; Kaiser v. Seaton, 62 Ia. 463.

Digitized by Google

moneys resulting therefrom are exempt from execution.[701]

The rule respecting transfers of homestead property or some part thereof, without the consent or fault of the claimant, is equally applicable to personal property which is exempt from execution. If a parcel thereof is exempt to a certain value only, and hence, is subject to sale under execution for the purpose of enabling the creditor to reach the surplus over that value, such sale cannot defeat or impair the debtor's rights to the extent of his exemption. He must be allowed out of the proceeds the amount of the exemption; and these proceeds cannot be seized under execution.[702] If an animal is killed or injured through the negligent or other wrongful act of another, the claim arising in favor of the owner cannot be subject to execution.[703] Moneys recovered as damages for the conversion of exempt property must be treated as the property itself would have been.[704] The officer making a levy may refuse to allow the defendant his exemption rights, and render it necessary for the latter to resort to an action at law. In such an event, the cause of action, and also any judgment that may be rendered thereon, are exempt from execution.[705] To hold otherwise would be to destroy the efficacy of the exemption laws. For by disregarding defendant's rights, and compelling him to resort to legal proceedings, it would always be possible to compel defendant to convert exempt property into

[701] Mudge v. Lanning, 68 Ia. 641; Wylie v. Grundyson, 51 Minn. 360, 38 Am. St. Rep. 509.

[702] Brewer v. Granger, 45 Ala. 580.

[703] Crawford v. Carroll, 93 Tenn. 661, 42 Am. St. Rep. 943.

[704] Harrell v. Harrell, 77 Ga. 130.

[705] Pearson v. Minturn, 18 Iowa, 36; Furman v. Dewell, 35 Iowa, 170; Sargent v. Chubbuck, 19 Iowa, 37; Marshall v. Ruddick, 28 Iowa, 487.

Digitized by Google

property subject to execution. Therefore, if a judgment is a part of the debtor's exempt property, or is the result of the unlawful taking of such property, it is not subject to be set off against a judgment held by the defendant in execution,[706] nor can it be otherwise subjected to execution without the consent of the debtor.[707] It does not matter what form of action the debtor chose to pursue when his exempt personal property was wrongfully taken by another. He was not restricted to an action of replevin to recover it in specie, but could sue in trover, in which event none but a money judgment could be obtained. Hence, a resort to that action might seem like an election to change the form and character of the property. Nevertheless, whatsoever he recovers is exempt from execution.[708]

If exempt property, whether real or personal, is first insured and then destroyed from the hazard insured against, by reason of which the owners become entitled to the indemnity for which they have stipulated, the change in the form of the property can scarcely be regarded as other than involuntary, nor do we see any reason why the cause of action to which the owners have thus become entitled, or the moneys which may ultimately be realized from it, should be treated otherwise than as the destroyed property would have been treated but for its destruction. It is true there are cases taking a very technical view of this question and

[706] Cleveland v. McCanna, 7 N. D. 455, 66 Am. St. Rep. 670; Curlee v. Thomas, 74 N. C. 51; Myers v. Forsythe, 10 Bush, 394; Butner v. Bowser, 104 Ind. 255; contra, Knabb v. Drake, 23 Pa. St. 489, 62 Am. Dec. 352.

[707] Falconer v. Head, 81 Ala. 513; Harrell v. Harrell, 77 Ga. 130; Andrews v. Rowan, 28 How. Pr. 126; Tillotson v. Wolcott, 48 N. Y. 188; Stebbins v. Peeler, 29 Vt. 289; Burke v. Hance, 76 Tex. 76, 18 Am. St. Rep. 28; Howard v. Tandy, 79 Tex. 450.

[708] Below v. Robbins, 76 Wis. 600, 20 Am. St. Rep. 89.

Digitized by Google

affirming that neither such cause of action, nor the money obtained therefrom, represents, or is any part of, the destroyed property, but is merely the result of a contract entered into by its owner and having no necessary connection with it, and hence that no right of exemption exists.[709] On the other hand it is claimed, and we think with the better reason, that the object of the statutes exempting from execution property, both real and personal, is to secure to persons of humble circumstances the protection of a home and the use of the common necessaries of life, of the tools and implements of their trade and the other articles specified in the statute; that the same policy which dictates the enactment of the exemption statutes would necessarily encourage debtors having property exempt from execution in taking means to replace such property in case of its loss by fire, and, hence, when such means are taken by the securing of policies of insurance, these policies and their proceeds must, upon the loss of the property by the peril insured against, be regarded as standing in its place in the view of the exemption laws, and therefore not subject to execution unless the debtor chooses to waive his exemption.[710]

The proceeds of exempt property which have hitherto been the subjects of discussion in this section have been those resulting from its sale, injury, or conversion, and have not included the produce or profits thereof. Certainly the exemption laws were designed to have a beneficial operation and to guarantee to the owners of

[709] Smith v. Ratcliff, 66 Miss. 683, 14 Am. St. Rep. 606; Wooster v. Page, 54 N. H. 125, 20 Am. Rep. 128.

[710] Ellis v. Pratt City, 111 Ala. 629, 56 Am. St. Rep. 76; Houghton v. Lee, 50 Cal. 101; Reynolds v. Haines, 83 Ia. 342, 32 Am. St. Rep. 311; Wright v. Brooks, 101 Tenn. 601; Cameron v. Fay, 55 Tex. 58; Puget Sound etc. Co. v. Jeffs, 11 Wash. 466, 48 Am. St. Rep. 885.

Digitized by Google

exempt property not merely the formal right of its possession, but also the right to its profitable employment. In many instances by such employment alone can it be of any substantial advantage to its owner. May he retain its fruits, or must his exemption be restricted to the property itself? If he is allowed as exempt a specified number of cows or hens, may his creditor subject to execution the milk of the one and the eggs of the other? These are questions to which we have found no answer in the reported decisions. Notwithstanding the rule that exemption statutes must be liberally construed, the answer will probably be that nothing is exempt which is not enumerated in the statute.

If a judgment, in trover, is recovered for the conversion of property, part of which was exempt from execution and the balance not, and there is nothing to show how much of such judgment proceeded from the exempt property, no part of it can be held as exempt from garnishment. To hold otherwise would enable the judgment debtor by this mingling of his property to retain some part of that which the statute meant to be subject to execution.[711] Where property is destroyed by fire, and the owners are in consequence entitled to indemnity from an insurance company, an instance may be afforded of the voluntary exchange of exempt for nonexempt property. In California it seems to have been held that money, due from an insurance company for indemnity for loss of the homestead residence by fire, retains the character of the premises destroyed, and is not subject to execution.[711a] But in New Hampshire different views are entertained.[712]

[711] Burke v. Hance, 76 Tex. 76.

[711a] Houghton v. Lee, 50 Cal. 101; Cooney v. Cooney, 65 Barb. 524.

[712] Wooster v. Page, 54 N. H. 125, 20 Am. Rep. 128.

Digitized by Google

§ 236. Property Exempt because Essential to the Use of Exempt Property.—In some of the states, where exemption statutes are interpreted with extreme liberality toward the claimant, various articles have been held to be exempt, not because they were specified in the statute, but because they were indispensable to the convenient and ordinary use of other articles of whose exemption there was no doubt. In New York, harness and vehicles have been exempted as part of a "team"; but this was because the court understood the word "team" to embrace the harness and vehicle, as well as the horses of which the team was composed. Hence the New York decision cannot fairly be cited as authority for the proposition that the exemption of a thing includes all other things necessary to its use. But, in Texas, the exemption of "a horse" has been held to include his saddle and bridle, and also the rope with which he was led or fastened. In these cases the court said: "A horse was not reserved because he was a horse, but because of his useful qualities, and his almost indispensable services; but what would be the benefit of a horse without shoes, or without saddle and bridle, or without gears, if employed for purposes of agriculture? It cannot be presumed that the legislature intended that a debtor should be reduced to the most primitive usage of riding without saddle or bridle; yet this may often be the only alternative, if such appendages be held not exempt from execution. It would seem that by fair construction the grants in the statute must include, not only the subject itself, but everything absolutely essential to its beneficial enjoyment." [713]

[713] Cobbs v. Coleman, 14 Tex. 599; Dearborn v. Phillips, 21 Tex. 449.

Digitized by Google

§ 236 a. Exemptions of Food, Provisions, etc., are generally allowed. With respect to the amount which will be regarded as exempt as necessary for family use there seem to be no decisions. Where an allowance is made for feed for live-stock, it will be construed as limited to the amount necessary to maintain them until they can be fatted and killed for their flesh, when that is the object for which they are kept, or until the next food-producing season when the stock is permanently kept.[714] Food cannot be exempted for stock which the defendant does not possess and has no present purpose of obtaining.[715] If a statute exempts grain, meat, vegetables, groceries, and other provisions on hand necessary for the support of the debtor and his family for one year, he is not, if he has some only of those articles, entitled to such an exemption out of them as will enable him to make sales therefrom and with the proceeds buy such of the other articles as he has not and as will be necessary for his support for a year. "The amount of exemption, or of benefit, to be derived from any particular class of property cannot be made to depend upon the possession or want of possession by the debtor of any of the other classes of property made exempt by any of the provisions of the exemption law."[716] While it is doubtless true that the statute does not contemplate that the debtor shall be entitled to hold articles of food as exempt on the ground that he intends, by selling them, to purchase other articles, yet it can scarcely be true, as stated by the court in the last quotation, that the amount of an exemption of one

[714] Farrell v. Higley, Hill & D. 87; Hall v. Penney, 11 Wend. 44, 25 Am. Dec. 601.

[715] Cowan v. Main, 24 Wis. 569; King v. Moore, 10 Mich. 538.

[716] George v. Hunter, 48 Kan. 651, 30 Am. St. Rep. 325.

Digitized by Google

class of property cannot be made to depend on the possession or want of possession of others. A debtor having all the articles specified in the statute could, doubtless, comfortably support himself and family with a less quantity of each than if he were compelled to support them upon one of the articles only, and hence, if he has but one, he must necessarily be entitled to more liberal exemption therefrom than if he had all. The provisions need not be in the form or condition required for immediate use. Corn not yet ground into meal,[717] and potatoes not dug,[718] may be exempt as provisions. The exemption of provisions for family use does not include food prepared by the keeper of a resturant for his customers,[719] nor meat or groceries constituting part of the debtor's stock in trade.[720]

§ 236 b. Stock in Trade.—Statutes exempting "the tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and in addition thereto, stock in trade not exceeding" a designated amount in value, have generally been held not to apply to merchants, or to stock bought to be resold as merchandise.[721] Stock in trade, as the terms are here used, signifies—1. The raw materials upon which the debtor works with his tools and implements; and 2. The articles manufac-

[717] Atkinson v. Gatcher, 23 Ark. 106. But it has been held that the exemption of flour does not include wheat. Salsbury v. Parsons, 36 Hun, 12.

[718] Carpenter v. Herrington, 25 Wend. 370, 37 Am. Dec. 239. Whether vegetables which had just begun to grow, and were not sufficiently matured to be used for food, were exempt was a question upon which the judges disagreed in King v. Moore, 10 Mich. 538.

[719] Coffey v. Wilson, 65 Iowa, 270; Bond v. Tucker, 65 N. H. 165.

[720] State v. Conner, 73 Mo. 572.

[721] Grimes v. Bryne, 2 Minn. 89; Guptil v. McFee, 9 Kan. 30.

Digitized by Google

tured or in process of manufacture out of such raw materials with his tools and implements, and kept or intended for sale.[722] These manufactured articles are exempt as part of the debtor's stock in trade, because, if they were not, his entire exemption of stock in trade would be practically destroyed, for it would be idle to exempt the raw material and permit it to be seized when greatly enhanced in value by the debtor's labor. One in the millinery and fancy goods business who had purchased the greater part of his stock from wholesalers, but had made up the balance out of material so purchased, and carried in stock until used, and who kept all of his stock for sale, claimed the whole as exempt. The court held that such part of his stock as was kept "indiscriminately for sale or for manufacture, as opportunity came, in the condition in which it was bought, was not stock in trade within the meaning of the statute," and that the exemption must be so construed as not to include those who were in fact merchants.[723] But, in Wisconsin and other states, a statute exempting "the tools and implements or stock in trade of any mechanic, miner, or other person, used or kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value," was very properly held to apply to merchants.[724] When a designated amount of his stock in trade has been set apart to the debtor as exempt, his creditors have no further interest in it, "and it may be sold or used in such way as to serve the necessities of the owner with-

[722] In re Jones, 2 Dill. 343; Bequillard v. Bartlett, 19 Kan. 382, 27 Am. Rep. 120; Stewart v. Welton, 32 Mich. 56; Hutchinson v. Roe, 44 Mich. 389.

[723] Hillyer v. Remore, 42 Minn. 254; Proper v. Hartley, 35 Minn. 340; see, also, McAbe v. Thompson, 27 Minn. 134.

[724] Wicker v. Comstock, 52 Wis. 316.

Digitized by Google

out doing wrong to any one." He need not re-embark in the same or any other business with it. He may "sell it, or keep it until a way opens for its profitable use." He does not forfeit his exemption by a purpose not to re-engage in business, or to sell the property set aside to him.[725]

§ 236c. Exemptions not Confined to Specific Articles.—Sometimes exemptions are granted of a certain amount in value of personal property, without any limitation respecting its character, or the debtor is permitted to take other property in place of that specifically exempted.[726] In either case, every conceivable chattel may be exempt, provided it does not in itself, or in connection with other property selected or set apart to the debtor, exceed in value the amount of the exemption. Hence, the debtor, when he is by statute allowed as exempt personal property not exceeding a designated value, may hold free from levy under execution fees due him as a justice of the peace,[727] or choses in action,[728] or moneys deposited in bank,[729] or stock in corporations,[730] or any other species of property.[731] If the debtor is assigned the full amount of his exemption,

[725] Rosenthal v. Scott, 41 Mich. 633; Martin v. Bond, 14 Colo. 466; Weil v. Nevett, 18 Colo. 10.

[726] State v. Farmer, 21 Mo. 160; Mahan v. Scruggs, 29 Mo. 282.

[727] Dane v. Loomis, 51 Ala. 487.

[728] Kennedy v. Smith, 99 Ala. 83; Leggett v. Van Horn, 76 Ga. 795; Miller v. Mahoney (Ky.), 29 S. W. 879; Mace v. Heath, 34 Neb. 54; Chilcote v. Conley, 36 Ohio St. 545; Frost v. Naylor, 68 N. C. 325; Probst v. Scott, 31 Ark. 652; Strouse's Ex'r v. Becker, 44 Pa. St. 206.

[729] Fanning v. First N. B., 76 Ill. 53; Rutter v. Shumway, 16 Colo. 95.

[730] Roden v. Brown, 103 Ala. 324.

[731] Darby v. Rouse, 75 Md. 26; Bernheim v. Andrews, 65 Miss. 28; Cunningham v. Conway, 25 Neb. 615; Swandale v. Swandale, 25 S. C. 389.

Digitized by Google

he is entitled to further assignments whenever he can show that the property has been taken from him without his fault, or has been consumed in maintaining himself or family, or has deteriorated in value without fault on his part, or has been applied by him to the payment of debts.[732] A trust was created by a will, under which the debtor was entitled to have paid to him semi-annually the income of the trust property. The trustees were garnished, but proceeded, nevertheless, to pay over the income as it accrued, on the ground that no one of the semi-annual payments exceeded three hundred dollars, and the debtor was, by a statute of the state, entitled to an exemption of that amount of personal property. The trustees were held to be answerable, notwithstanding these payments, on the ground that the aggregate amounts received and paid over by them after the levy of the garnishment had exceeded the exemption specified in the statute.[733] We are entirely unable to understand the reasoning of the court, if reasoning it may be called.

§ 237. **Miscellaneous Matters.**—In New York, a physician having books of his profession of small value was allowed to retain them as exempt, on the ground that they constituted part of his family library.[734] The exemption of cloth manufactured on a farm was, in Kentucky, held to protect carpets so manufactured.[735] In Wisconsin, the exemption of stock in trade is confined to stock in some lawful trade or business. It cannot be invoked by the keeper of an unlicensed sa-

[732] Weis v. Levy, 69 Ala. 211; Campbell v. White, 95 N. C. 344.
[733] Bremer v. Mohn, 169 Pa. St. 91.
[734] Robinson's Case, 3 Abb. Pr. 466.
[735] Sims v. Reed, 12 B. Mon. 53.

Digitized by Google

loon.[736] Where the statute exempts an "insurance on the life of a debtor, a policy agreeing to pay him a certain sum of money at the end of a stipulated period, if he should so long live, and, if he should not so live, then that the sum should be paid at his death to his heirs, is a policy of life insurance within the meaning of the statute."[737] A ferry-boat is not exempt from execution because it is on a mail route, and is used, among other purposes, to convey the United States mail across the stream.[738] In Texas the statute exempts the "books belonging to the trade or profession of any citizen." The professional library of a lawyer may, therefore, in that state, after his death, be set aside for the benefit of his widow and children, as exempt property.[739] The statutes exempting from execution the libraries of professional men differ in their character. In some of them the right of exemption is confined to persons who are householders, or heads of families,[740] while in others nothing but the professional character of the claimant is essential to his right.[741] These exemptions apply in favor of attorneys at law, except in so far as they are restricted by general statutory provisions denying the right of exemption as against judgments founded upon a breach of certain professional obligations. Thus, the statutes of Nebraska controlling the subject of exemptions provide that nothing therein shall be so construed as to exempt

[736] Harrod v. Hamer, 32 Wis. 162.

[737] Briggs v. McCullough, 36 Cal. 542.

[738] Lathrop v. Middleton, 23 Cal. 257, 83 Am. Dec. 112; Parker v. Porter, 6 La. 169.

[739] Fowler v. Gilmore, 30 Tex. 432.

[740] Fink v. Fraenkle, 14 N. Y. Supp. 140.

[741] Taylor v. Winnie, 59 Kan. 16; Roberts v. Moudy, 30 Neb. 653, 27 Am. St. Rep. 426.

Digitized by Google

any property from execution for money had and owing by any attorney at law for money or other valuable consideration received by him for any person or persons. Under such a statute an attorney at law cannot hold his library as exempt from execution against a writ founded upon a judgment against him for moneys received by him in his professional capacity and not paid over to his client.[742] In Missouri the ninth section of the act respecting executions exempts certain property when owned by the head of a family; and the eleventh subdivision of that section gives all lawyers the "privilege of selecting such books as may be necessary to their profession in place of other property herein allowed, at their option." Under this statute a lawyer is not entitled to an exemption of his library regardless of its value, but only to the privilege of selecting books in place of other exempt property, so that the amount of his exemption including such books shall not exceed in value the exemption accorded to other heads of families.[743] Under a statute exempting tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, a farmer is entitled to an exemption of seed wheat, because it is unquestionably necessary to the carrying on of his business.[744] The benefit of the exemption laws may be claimed against a garnishment,[745] and is not lost to the defendant by the neglect of the garnishee to claim it for

[742] Shreck v. Gilbert, 52 Neb. 813.
[743] Brown v. Hoffmeister, 71 Mo. 411.
[744] Stilson v. Gibbs, 46 Mich. 215.
[745] Fanning v. First Nat. Bank, 76 Ill. 52.

Digitized by Google

him.[746] In North Carolina a communion service consisting of "a silver pitcher, two silver plates, and two silver goblets, with the box in which they were kept, used in the public worship of a church," were levied upon, under a judgment in favor of the pastor, for arrears of his salary. The supreme court intimated that they might be held exempt under the constitutional guaranty of the right of all citizens "to worship Almighty God according to the dictates of their own consciences," but preferred to place its decision on the less questionable ground that the judgment debtor was a mere trustee, having no beneficial interest in the property, and therefore no estate therein subject to execution.[747]

A statute was enacted declaring that "the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor liable for his debts." In interpreting this law, it was held to exempt from execution, based upon a debt created subsequently to its passage, the estate of a husband as tenant by curtesy in his wife's lands, whether such estate vested before or after the taking effect of the enactment.[748]

§ 238. Exemption Continues After Death of Owner in Favor of His Family.—The decisions frequently refer to the fact that the policy of the exemption law embraces the protection of the debtor's family even more than of

[746] Jones v. Tracy, 75 Pa. St. 417.

[747] Lord v. Hardie, 82 N. C. 241.

[748] Hitz v. National Met. Bank, 111 U. S. 722; White v. Hildreth, 32 Vt. 265; Ruth v. Ottenheimer, 6 Or. 231.

Digitized by Google

himself. This policy would be very inadequately pursued if it did not continue after the decease of the debtor. His wife, if she survives him, then becomes the householder or head of the family; and she and her children, being thus deprived of their chief protection and support, are more than ever before in need of all the rights and privileges guaranteed by the exemption laws. Generally, and perhaps universally, the necessities of the now dependent family have been recognized, and as far as possible provided for by laws, under which the exempt property is preserved from the grasp of creditors, and set aside for the use of the family.[749] These laws are usually incorporated into that portion of the statute regulating the settlement and distribution of the estates of deceased persons, and are generally interpreted and carried into effect by the probate and surrogate courts.

[749] Williams v. Hall, 33 Tex. 212; Fowler v. Gilmore, 30 Tex. 433; Wally v. Wally, 41 Miss. 657; Mason v. O'Brien, 42 Miss. 420; Brown v. Brown, 38 Miss. 39; Hardin v. Osborne, 43 Miss. 532.

Digitized by Google

CHAPTER XV.

HOMESTEAD EXEMPTIONS.

§ 239. Of the homestead exemption, and inquiries in relation thereto.
§ 240. Who entitled to select a homestead.
§ 241. How the homestead right may be acquired.
§ 242. Of the title necessary to sustain a homestead claim.
§ 243. Where claimant has only a moiety of the title.
§ 244. Using the homestead for business and rental purposes.
§ 245. The homestead appurtenances.
§ 246. The amount of property which may be held, and the mode of its selection or designation.
§ 247. Claiming two or more distinct parcels.
§ 247a. Produce and proceeds of homestead.
§ 248. Abandonment and forfeiture.
§ 248a. Termination of homestead otherwise than by abandonment.
§ 249. Liabilities against which homesteads are not exempt.
§ 249a. Claims for moneys fraudulently invested in.
§ 249b. Exemption against judgments for torts.
§ 249c. Exemption against judgments in favor of state or the United States.
§ 249d. Sale of homesteads to satisfy judgment liens.
§ 249e. Attachment liens.
§ 249f. Vendor's lien against homestead.
§ 249g. Mechanic's lien against homestead.
§ 249h. Miscellaneous debts against which homestead is not exempt.
§ 250. Lands acquired under the homestead laws of the United States.
§ 250a. Excess in area or value, subjecting to execution.

§ 239. Of the Homestead Exemption, and Inquiries in Relation Thereto.—In nearly all the states of the Union, the dwelling of the debtor, with its appurtenances, when occupied by himself and family as their homestead, is exempt from execution. In many of the states, the homestead is so far held by a title different

Digitized by Google

from that of the claimant's other real estate, that it cannot be alienated nor encumbered without the concurrence of himself and his wife, expressed and attested in substantially the mode prescribed by statute;[1] that upon his death it does not become liable to administration as does his other estate; that it either vests in the wife as survivor of a kind of joint tenancy,[2] or continues to be held as a homestead for the use of the widow or children, or both. Of the various incidents attending a homestead estate we shall here undertake to treat of but one, namely, its exemption from execution. It follows from the fact that a homestead is not subject to attachment or execution that a judgment debtor cannot, by any conveyance or other disposition which he may make of it, prejudice his creditors, or give them any just cause for complaint. If they show that his conveyance was infected by actual fraud, because his object was to hinder, delay, or defraud them, they do no more than to establish that it ought not to be employed against them for the purpose of depriving them of any remedy against him, which, but for such conveyance, they might have. This only makes their rights and remedies the same as if no transfer had been attempted; and, as in the absence of the attempted disposition, the creditors had no right to subject the property to execution, they derive no additional right from the fraudulent transfer, and the homestead property is still beyond their reach.[3] Therefore, a judgment debt-

[1] Lubbock v. McMann, 82 Cal. 226. 16 Am. St. Rep. 108; Hart v. Evans. 80 Ga. 330; Timothy v. Chambers. 85 Ga. 267. 20 Am. St. Rep. 163; Alt v. Banholzer, 39 Minn. 511. 12 Am. St. Rep. 681; Duncan v. Moore, 67 Miss. 136; Texas L. Co. v. Blalock, 76 Tex. 85.

[2] For the consideration of the subject of the homestead as a joint tenancy, see chapter III. of Freeman on Cotenancy and Partition.

[3] Bogan v. Cleveland, 52 Ark. 101. 20 Am. St. Rep. 158; Butler v. Nelson, 72 Iowa, 372; Wheeler & W. M. Co. v. Bielland, 97 Iowa,

Digitized by Google

or may execute a deed or gift of the homestead, or convey it to a third person in consideration of property transferred to the debtor's wife, and such conveyance cannot be successfully assailed by creditors, because it does not take away from them anything to which they are otherwise entitled.[4] Hence, if a suit is commenced to set aside a conveyance as being in fraud of the plaintiff as a creditor of the defendant, the final decree must, if any part of the property conveyed is shown to have been exempt from execution as the homestead of the grantor, except from its operation such homestead, and not make any direction or reference thereto, which, if pursued, would prejudice the right of exemption.[5] In South Carolina, while it is conceded that a homestead is not subject to a judgment lien, and that a conveyance thereof cannot be fraudulent as against creditors of the grantor, it is held that he cannot, subsequently to his conveyance, claim any homestead in the property conveyed, because, as against him, the effect of the conveyance is to divest him of all title and interest, and the court cannot set aside a homestead out of property of which the claimant has divested himself of all interest.[6] If a husband conveys his homestead to his wife for the purpose of placing it beyond the

637; Wilson v. Taylor, 49 Kan. 774; Werr v. Wilson, 84 Ky. 14; Giles v. Miller, 36 Neb. 346, 38 Am. St. Rep. 30; Munson v. Carter, 40 Neb. 417; Dortch v. Benton, 93 N. C. 190, 2 Am. St. Rep. 331; McDannell v. Ragsdale, 71 Tex. 23, 10 Am. St. Rep. 729.

[4] Airey v. Buchanan, 64 Miss. 181.

[5] Kelly v. Connell, 110 Ala. 543; McPhee v. O'Rourke, 10 Colo. 301, 3 Am. St. Rep. 579; First N. B. v. Rhea, 155 Ill. 434; Quinn v. The People, 146 Ill. 275; Walker v. Sauer, 97 Mich. 464; Crummen v. Bennett, 68 N. C. 294; Dortch v. Benton, 98 N. C. 190, 2 Am. St. Rep. 331; McGowan v. McGowan, 122 N. C. 164; Younger v. Ritchie, 116 N. C. 782; Fischer v. Schultz, 98 Wis. 462.

[6] Ketchin v. McCarley, 26 S. C. 1, 4 Am. St. Rep. 674.

Digitized by Google

reach of his creditors, this does not forfeit her homestead rights.[7]

We shall pursue only those inquiries which we feel confident must be pursued by plaintiffs when desirous of knowing whether certain real estate may be made available under execution. In a few of the states, homestead claimants must notify the officer charged with the execution of the writ that they claim the exemption. Otherwise, they irrevocably waive their rights.[8] Thus, in Arkansas, it is said that, with respect to interposing claims for exemption, lands and chattels stand on the same footing; that the debtor must claim his exemptions, and see to it that a supersedeas issues; that if the officers neglect or refuse to do their duties, a remedy exists either by mandamus or appeal; and that a failure to prosecute the remedy is a waiver of the right.[9] The reverse of this is the usual rule. The homestead right having been acquired in the manner designated by the statutes of the particular state, all persons must take notice of it. It need not be claimed.[10] As a general rule, it cannot be waived except by a declaration in writing executed by both husband and wife in the manner prescribed by statute. Hence, if an officer sees proper to levy upon a home-

[7] McPhee v. O'Rourke, 10 Colo. 301, 3 Am. St. Rep. 579; Riggs v. Sterling, 60 Mich. 643, 1 Am. St. Rep. 554; First N. B. v. Glass, 79 Fed. Rep. 706.

[8] Rector v. Rotton, 3 Neb. 171; Livermore v. Boutelle, 11 Gray, 217; Bell v. Davis, 42 Ala. 461; Wright v. Grabfelder, 74 Ala. 460.

[9] Chambers v. Perry, 47 Ark. 403. See Irwin v. Taylor, 48 Ark. 225, with respect to interposing claim of homestead against attachment proceedings.

[10] Vogler v. Montgomery, 54 Mo. 584; Barney v. Leeds, 51 N. H. 253; Lambert v. Kinnery, 74 N. C. 350; Goldman v. Clark, 1 Nev. 611; Watts v. Gallagher, 97 Cal. 47; Rodgers v. Baker, 96 Ga. 800; Imhoff v. Lipe, 162 Ill. 282; Ratliff v. Graves, 132 Mo. 76; McCracken v. Adler, 98 N. C. 400, 2 Am. St. Rep. 340; Buie v. Scott,

Digitized by Google

stead, the claimants need not object. They may regard his acts as destitute of all legal authority. They may permit him to make a sale and execute a deed to the purchaser. For all these proceedings have no effect on their title,[11] beyond that of casting a cloud over it. Of course, there may be judicial proceedings to which persons entitled to homestead are made parties, in which the allegations of the pleadings and the relief sought are such that a judgment entered against such persons may be conclusive against their homestead rights. If so, they cannot remain silent, suffer judgment, and subsequently avoid its effect. Thus, if a suit is brought to subject lands to a judgment or other demand, or to enforce some alleged lien thereon, in which event the homestead claim, if asserted, must prevent any recovery on the part of the complainants, the defendants must, in some appropriate manner, present such claim, and they cannot, after judgment is entered against them directing the sale of their homestead, permit such judgment to remain in force and avoid its effect in some collateral proceeding. A purchaser under such a judgment must necessarily be protected by it.[12]

107 N. C. 181; Bailey v. Barron, 112 N. C. 54; Fulton v. Roberts, 113 N. C. 421.

[11] Dye v. Mann, 10 Mich. 291; Alley v. Bay, 9 Iowa, 509; Helfenstein v. Cave, 6 Iowa, 374; Hubbell v. Canady, 58 Ill. 425; Vanzant v. Vanzant, 23 Ill. 536; Williams v. Swetland, 10 Iowa, 51; Bartholomew v. West, 2 Dill. 290; Ferguson v. Kumler, 25 Minn. 183; Barney v. Leeds, 51 N. H. 253; Doyle v. Coburn, 6 Allen, 73; Beecher v. Baldy, 7 Mich. 488; Abbott v. Cromartie, 72 N. C. 292, 21 Am. Rep. 457; Wing v. Hayden, 10 Bush, 276; Ring v. Burt, 17 Mich. 465; Wiggins v. Chance, 54 Ill. 175; Pardee v. Lindley, 31 Ill. 174, 83 Am. Dec. 219; Hoskins v. Litchfield, 31 Ill. 137; Moore v. Titman, 33 Ill. 358; Cummings v. Long, 16 Iowa, 41, 85 Am. Dec. 502; Morris v. Ward, 5 Kan. 239; Myers v. Ford, 22 Wis. 139; Myers v. Ham, 20 S. C. 522. This latter case seems in conflict with the prior case of Oliver v. White, 18 S. C. 235.

[12] Brownell v. Stoddard, 42 Neb. 177; Traders' N. B. v. Schorr, 20

Digitized by Google

In Iowa, where the defendant owned a large tract of land occupied by him as a homestead, and a part thereof, not including the dwelling in which he resided and the appurtenant buildings, was sold under execution, without first platting and setting apart a homestead, it was held that the sale was voidable only, and not void; that it might be set aside in a direct proceeding between the parties; that the defendant might disregard the irregularity and let the sale stand, and therefore that the sale "cannot be collaterally called in question."[13] The grounds of this decision are not sufficiently disclosed by the court to bring them within our comprehension. The defendant was left in possession of the dwelling-house and its appurtenances, and it may be that the court regarded his silent acquiescence as equivalent to his acceptance of the part left him as his homestead. Whether the same conclusion could have been reached had the whole premises been sold, leaving the debtor no homestead whatsoever, is doubtful. Considered in the light of the more recent decisions in the same state, what the court intended to affirm must have been, that if a sale is made of premises which are subject to the claim of homestead, it rests only with the homestead claimants to avoid such sale, and, if they do not, third persons cannot collaterally attack it. As to the claimants themselves, there is no doubt that they may, at any time after the sale, maintain proceedings to annul it and to recover the property subject thereto, and that, whenever they so wish, the sale must be adjudged void.[14]

Wash. 1, 72 Am. St. Rep. 000; Snapp v. Snapp, 87 Ky. 554; Hill v. Lancaster, 88 Ky. 338.

[13] Martin v. Knapp, 57 Iowa, 340.

[14] Visek v. Doolittle, 69 Iowa, 602; Owens v. Hart, 62 Iowa, 620.

Digitized by Google

There is a substantial difference between the sale under execution of a tract all of which is homestead, and the sale of a larger tract of which the homestead is a part. In the latter case, the sale may be construed as having for its subject that part of or interest in the land which is in excess of the homestead. That view has been taken in Missouri, where the court, on ejectment being brought against a purchaser, declared the sale not to be void, appointed commissioners to admeasure the homestead, and gave judgment only for the part assigned by them to the plaintiff.[15] In several other states such sales are not treated as void, but merely as being subject to the defendant's homestead rights, and therefore as creating between the purchaser and the defendant in execution the relation of tenants in common.[16] A preponderance of the authorities, however, pronounces void a sale under execution of the homestead, though the lands sold exceed in quantity or value the amount which can be retained as exempt.[17] Two very conclusive reasons support this conclusion. They are, first, that a sale prior to the separation of the exempt from the nonexempt lands would render it impossible for intending purchasers to ascertain either the quantity or location of the lands sold, and would therefore inevitably lead to a sale at an inadequate

[15] Crisp v. Crisp, 86 Mo. 630; Bunn v. Lindsay, 95 Mo. 250, 6 Am. St. Rep. 49.

[16] Letchford v. Cary, 52 Miss. 791; Swan v. Stephens, 99 Mass. 7; Silloway v. Brown, 12 Allen, 32; Cross v. Weare, 62 N. H. 125; Bradford v. Buchanan, 39 S. C. 23; Flatt v. Stadler, 16 Lea, 371.

[17] Ferguson v. Kumler, 25 Minn. 183; Kipp v. Bullard, 30 Minn. 84; Kerr v. S. P. Commrs., 8 Biss. 276; Mebane v. Layton, 89 N. C. 396; Fogg v. Fogg, 40 N. H. 282, 77 Am. Dec. 715; Hartwell v. McDonald, 69 Ill. 293; McCanless v. Flinchum, 98 N. C. 358; Visek v. Doolittle, 69 Iowa, 602; Riggs v. Sterling, 60 Mich. 643, 1 Am. St. Rep. 554; McCracken v. Adler, 98 N. C. 400, 2 Am. St. Rep. 340; Philbrick v. Andrews, 8 Wash. 7.

Digitized by Google

price; and second, a sale of the whole premises would probably embarrass the debtor in the exercise of his statutory right of redemption. "That right could not be exercised without paying the entire sum bid, although a portion, and in some instances perhaps a greater portion, of such sum may have been bid on account of the exempt land." [18] In every case of a proposed levy upon real estate, the parties interested in making the levy should, without waiting for any claim on the part of the defendant, first satisfy themselves that the property is not exempt as a homestead. In determining this question, they must make some, and perhaps all, of the following inquiries: 1. Is the defendant a person on whose behalf, or on behalf of whose family, a homestead exemption can be acquired? 2. Have the measures necessary for acquiring such exemption been taken with reference to the realty on which the levy is about to be made? 3. Is the defendant's title or estate such as can be held as a homestead under the statute? 4. Is the use to which the property is put such as wholly or partly destroys its character of a homestead? 5. Does the property exceed in area or value the limit prescribed by statute? 6. Is the parcel upon which a levy is desired so distant or distinct from the family residence that it cannot in law be deemed a part of the homestead? 7. Has there been any abandonment of the homestead rights? 8. Conceding that a valid homestead claim exists, is the liability upon which the writ issued one against which this claim can be asserted? In considering these questions, or any of them, it should not be forgotten that the rule, that exemption laws should be liberally construed in favor of the claimants thereunder, is equally applicable

[18] Mohan v. Smith, 30 Minn. 259.

Digitized by Google

to statutes creating homestead exemptions, and hence that, in the presence of serious doubt, the right of exemption will generally be affirmed [19]

§ 240. Who Entitled to Claim a Homestead.—There are states in which an unmarried man having no family dependent on him for support is entitled to the full benefit of the homestead exemption.[20] There are other states in which such a man is not entitled to the same exemption as a married man; but is, nevertheless, entitled to a homestead exemption of less value. But the chief object of the homestead laws is to shelter the family. In the majority of the states, the claimant must be the head, or one of the heads, of a family.[21] The head of a family is generally a husband or father. This is not, however, an invariable rule. A wife may, in most states, claim the benefit of the homestead laws. A husband and wife, though childless, constitute a family,[22] and though she is, in some of the states, given the right to dedicate a homestead where he has failed to exercise this privilege, yet, as head of the family, the right must still belong to him, if he chooses to act, and its exercise cannot be controlled by her as against his

[19] Keyes v. Cyrus, 100 Cal. 322, 38 Am. St. Rep. 296; Timothy v. Chambers, 85 Ga. 267, 21 Am. St. Rep. 163; Moore v. Flynn, 133 Ill. 74; Mitchelson v. Smith, 28 Neb. 583, 26 Am. St. Rep. 357.

[20] Greenwood v. Maddox, 27 Ark. 648; Myers v. Ford, 22 Wis. 139; Gardner v. Batts, 114 N. C. 496.

[21] Folsom v. Carli, 5 Minn. 333, 80 Am. Dec. 429; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Tillotson v. Millard, 7 Minn. 520; Gee v. Moore, 14 Cal. 472; Bowman v. Norton, 16 Cal. 213; Davenport v. Alston, 14 Ga. 271; Kitchell v. Burgwin, 21 Ill. 40; Morrison v. McDaniel, 30 Miss. 217; Sears v. Hanks, 14 Ohio St. 298, 84 Am. Dec. 378; Griffin v. Sunderland, 14 Barb. 456. An alien resident is entitled to a homestead. McKenzie v. Murphy, 24 Ark. 155.

[22] Miller v. Finegan, 26 Fla. 29.

Digitized by Google

action.[23] We have already considered the question who is the head of a family within the meaning of the statutes exempting personal property from execution, and what we have there said is equally applicable to the same question when applied to homestead exemptions.[24] But a person may be the head of a family, within the meaning of the exemption statutes, without being married, and without being a parent.[25] Thus, a man who has living with him his mother, or sister, or other persons dependent on him for support, is entitled to a homestead exemption.[26] A woman supporting her illegitimate child is more within the need, and as much entitled to the benefit, of the homestead laws as though she had been a wedded mother.[27] The same rule applies to a father residing with and supporting an illegitimate child, whether its mother resides with them or not.[28]

We know not why any other woman who supports a dependent relative should not be entitled to a homestead, just as her brother would be if he were performing the same meritorious act. But the courts have illogically and ungallantly determined otherwise,[29] though more recently some of them have reached a less unreasonable conclusion upon this subject.[30] If the family consists of a parent and his or her children, the latter must, if adults, be unable to support themselves, through some infirmity other

[23] Parrish v. Frey, 18 Tex. Civ. App. 271.
[24] Ante, § 222.
[25] See § 222.
[26] Parsons v. Livingston, 11 Iowa, 104, 77 Am. Dec. 135.
[27] Ellis v. White, 47 Cal. 73.
[28] Lane v. Phillips, 69 Tex. 240, 5 Am. St. Rep. 41.
[29] Woodworth v. Comstock, 10 Allen, 425; Lathrop v. Loan Ass'n, 45 Ga. 483.
[30] Chamberlain v. Brown, 33 S. C. 597.

Digitized by Google

than indolence. "Adults, male, or if unmarried, female, who have robust health, and all usual faculties, lie under the necessity of supporting themselves, unless they find others willing to support them who can do so, without making such service a foundation for exempting their property from liability for the payment of their just debts." [31] As the fact that a person is unmarried is not conclusive against his or her claim, so the fact that he or she is married is not conclusive in favor of the claim. One may be the head of a family without being married, and one may be married without being the head of a family. A man living in one state, with a family residing in another state, is not entitled to the benefit of a homestead exemption as the head of a family in the former state. The property claimed must first be made the home of the family.[32] But a married woman, having her niece living with her, may make a valid homestead claim, though her husband resides elsewhere.[33] It would probably be otherwise if it were shown that he also had a homestead; for the law does not allow one to each of the spouses.[34] "A family is a collective body of persons who live in one house under one head or manager," [35] but the mere residing together of a number of persons, even though they should depend on and recognize one of their number as their head or manager, does not necessarily constitute them a family, or him the head of a family,

[31] Décuir v. Benker, 33 La. Ann. 320.

[32] Cary v. Tice, 6 Cal. 625; Benedict v. Bunnell, 7 Cal. 245; Meyer v. Claus, 15 Tex. 516; Keiffer v. Berney, 31 Ala. 192; Farlin v. Sook, 26 Kan. 397; Block v. Singley, 91 Mich. 50.

[33] Gambette v. Brock, 41 Cal. 78.

[34] Dwinell v. Edwards, 23 Ohio St. 603.

[35] Duncan v. Frank, 8 Mo. App. 286; Ridenour-Baker Co. v. Monroe, 142 Mo. 165.

Digitized by Google

within the meaning of the exemption laws, even when they are related to one another by the ties of consanguinity.[36] There must be between them and him some duty, legal or moral, and some reason for their dependence on him such as is usually recognized as adequate. If they are minors, not capable of caring for themselves, and he or she has assumed toward them the parental relation, and they reciprocally occupy toward one another the relations of parent and child, they may be regarded as a family, and their head as entitled to a homestead exemption, where he, in assuming his relation toward them, has not acted as a mere volunteer.[37] Where a brother and sister or father and daughter live together as one household, she being an adult, there is some doubt whether the relation between them is one of such dependence as to entitle him to a homestead. It is true, under such circumstances, the man is under no legal obligation to support or care for the woman, and it has been hence held that he is not entitled to a homestead.[38] If, however, she is in need either of his support or protection, and he cannot be regarded as an officious volunteer in giving it, we believe that the better view is, that the woman, though an adult, should be regarded as a dependent, and where she constitutes part of the household of which her father or brother is the manager and provider, that he is entitled to a homestead as the head of a family.[39] If a person undertakes to provide and care for children to whom he is not related, but without adopting them or assuming

[36] Holnback v. Wilson, 159 Ill. 148; Ellis v. Davis, 90 Ky. 183.

[37] Cofer v. Scroggins, 98 Ala. 342, 39 Am. St. Rep. 54; Holloway v. Holloway, 86 Ga. 682, 22 Am. St. Rep. 484; Richie v. Duke, 70 Miss. 66; Wagener v. Parrott, 51 S. C. 489, 64 Am. St. Rep. 695.

[38] Walker v. Thomason, 77 Ga. 682.

[39] Moyer v. Drum, 32 S. C. 165, 17 Am. St. Rep. 850.

Digitized by Google

any legal or enforceable obligation to them, and he is therefore at liberty to discontinue his care and support at his pleasure, it is doubtful, though they constitute a part of his household, whether he can be regarded as the head of a family, and, as such, entitled to a homestead exemption.[40]

In some instances persons have been allowed to retain homesteads after ceasing to be heads of families; as where the wife and children have either died, or have permanently abandoned their home, leaving it in the possession of the husband,[41] even where the children have all become adults, if they still reside with their father, and treat him as the head of the family.[42] We doubt the soundness of these decisions. When the family ceases, we think the right to exemption as a married person, or as a householder or head of the family, must also terminate.[43] The fact that husband and wife are only temporarily in the state, and intend to migrate as soon as they can make a certain amount of money, does not disqualify them from claiming a homestead.[44] An alien domiciled in Arkansas was held to be there entitled to the benefit of the homestead exemption, although the statute did not profess to extend such benefits to any persons except "free white citizens of the state, male or female."[45] Domicile in a state is

[40] Bosquett v. Hall, 90 Ky. 566, 29 Am. St. Rep. 404; Mullins v. Looke, 8 Tex. Civ. App. 198.

[41] Doyle v. Coburn, 6 Allen, 71; Silloway v. Brown, 12 Allen, 30; Barney v. Leeds, 51 N. H. 253; Bipus v. Deer, 106 Ind. 135.

[42] Bank of Versailles v. Guthrey, 127 Mo. 189, 48 Am. St. Rep. 621.

[43] Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Cooper v. Cooper, 24 Ohio St. 488; 7 Chic. L. N. 217; Gee v. Moore, 14 Cal. 472; Louisville B. Co. v. Anderson (Ky.), 44 S. W. 636; Chamberlain v. Darrow, 46 Hun, 48.

[44] Dawley v. Ayres, 23 Cal. 108.

[45] McKenzie v. Murphy, 24 Ark. 155.

Digitized by Google

essential to a successful claim to a homestead exemption under the laws of some of the states,[46] and removal from the state operates as an abandonment of a homestead previously existing.[47] Where the defendant is entitled to a homestead exemption as the head of a family, he must possess that status at the time of the levy. If the levy is proper when made, the judgment creditor thereby acquires a special lien which cannot be divested by the defendant subsequently becoming the head of a family.[48]

The same person cannot be entitled to two homestead exemptions at the same time. If, after dedicating one homestead, he acquires and claims another, in some of the states, this may operate as an abandonment of the first homestead, while in others, as where the abandonment cannot be made except by an instrument in writing executed in the mode prescribed by statute, the attempt to claim the second homestead while the first remains unabandoned is void.[49]

In some of the states, as in California, a wife may dedicate a homestead where her husband has failed to do so. In other states, where the right is given only to heads of families, wives may be required, through the desertion of their husbands, to assume the obligations and duties of heads of their families, and, where such is the case, they are entitled to claim homesteads as exempt.[50] If, however, a husband remains with his fam-

[46] Alston v. Ulman, 39 Tex. 158.

[47] Baker v. Legget, 98 N. C. 304; Finley v. Saunders, 98 N. C. 462.

[48] Pender v. Lancaster, 14 S. C. 25, 37 Am. Rep. 720; Selders v. Lane, 40 Ohio St. 345.

[49] Waggle v. Worthy, 74 Cal. 266, 5 Am. St. Rep. 440; Kaes v. Gross, 92 Mo. 647, 1 Am. St. Rep. 767.

[50] Hollis v. State, 59 Ark. 211, 43 Am. St. Rep. 28; McPhee v. O'Rourke, 10 Colo. 301, 3 Am. St. Rep. 579; Watterson v. Bonner

Digitized by Google

ily, he continues its head in the eyes of the law, though he is incompetent to support it, or is too indolent to do so, and quarrels with his wife and otherwise mistreats her, and hence she cannot claim a homestead exemption as the head of a family.[51] In Illinois, a wife is entitled to a homestead exemption in her separate real property, the statute having intended the homestead right "to every householder having a family."[52]

Though the statute gives a wife the right to dedicate a homestead if her husband has failed to do so, this right is accorded to her only as a member of his family, and if she has ceased to be such member, and renounced her right to support from him, and is living apart from him under an agreement of separation, she is not a member of his family, and is not entitled to dedicate a homestead, where she has no minor child living with her or dependent upon her for support.[53]

§ 241. How the Homestead Exemption may be Created.—The first thing to be done to impress the homestead exemption on property is to make it a home. The law does not exempt future homesteads. It throws its protection around only that which is already consecrated by being the residence of the claimant as the home of himself and his family. The declaration which the claimant may be required to file and record does not create a homestead. It is merely legal notice that one already exists, and that the claimant desires that

Co., 19 Mont. 554, 61 Am. St. Rep. 527; McDannell v. Ragsdale, 71 Tex. 23, 10 Am. St. Rep. 729.

[51] Johnson v. Little, 90 Ga. 781; Barry v. Western A. Co., 19 Mont. 571, 61 Am. St. Rep. 530.

[52] Zander v. Scott, 165 Ill. 51.

[53] Estate of Noah, 72 Cal. 583, 2 Am. St. Rep. 829; Wickersham v. Comerford, 96 Cal. 433.

Digitized by Google

it shall not be longer subject to forced sale under execution. The homestead exemption cannot exist upon property upon which the claimant and his family have never resided.[54] The fact that there is a homestead must precede the declaration of its existence. The declaration is not only false: it is also invalid if it precedes this fact. Where the law requires a declaration to be filed, the filing is of no consequence, unless it can be shown that the premises were then occupied as a homestead. It is not sufficient that they had been so occupied before, or that they are so occupied after, the filing.[55] In New Hampshire, buildings having been completed for the purposes of occupation as a home, the owner commenced to move in. While he was moving, and after part of his furniture was in the house, an attachment was levied. But it was held that the homestead character had been impressed on the

[54] Kaster v. McWilliams, 41 Ala. 302; Cook v. McChristian, 4 Cal. 23; Moss v. Warner, 10 Cal. 296; Holden v. Pinney, 6 Cal. 234; Benedict v. Bunnell, 7 Cal. 245; Tourville v. Pierson, 39 Ill. 446; Charless v. Lamberson, 1 Iowa, 435; Christy v. Dyer, 14 Iowa, 438, 81 Am. Dec. 493; Cole v. Gill, 14 Iowa, 527; Elston v. Robinson, 23 Iowa, 208; Brown v. Martin, 4 Bush, 47; Dyson v. Sheley, 11 Mich. 527; Coolidge v. Wells, 20 Mich. 79; Campbell v. Adair, 45 Miss. 170; Kresin v. Maw, 15 Minn. 116; Holtt v. Webb, 36 N. H. 158; True v. Estate of Morrill, 28 Vt. 672; Morgan v. Stearns, 41 Vt. 398; Davis v. Andrews, 30 Vt. 678; Philleo v. Smalley, 23 Tex. 498; Franklin v. Coffee, 18 Tex. 413, 70 Am. Dec. 292; Russ v. Henry, 58 Vt. 388; Williams v. Dorris, 31 Ark. 408; Tillotson v. Millard, 7 Minn. 513, 82 Am. Dec. 112; Turner v. Turner, 107 Ala. 465; 54 Am. St. Rep. 110; Tillar v. Bass, 57 Ark. 179; Fflster v. Dascey, 68 Cal. 572; Boreham v. Byrne, 83 Cal. 23; Hayden v. Slaughter, 43 La. Ann. 385; Power v. Burd, 18 Mont. 22; Galligher v. Smiley, 28 Neb. 189, 26 Am. St. Rep. 319; Keyes v. Bump, 59 Vt. 391; Western M. & I. Co. v. Burford, 67 Fed. Rep. 860.

[55] Gregg v. Bostwick, 33 Cal. 227, 91 Am. Dec. 637; Mann v. Rogers, 35 Cal. 316; Prescott v. Prescott, 45 Cal. 58; Lee v. Miller, 11 Allen, 37.

Digitized by Google

property, and took precedence over the attachment.[56] So in Iowa, where a debtor removed to D. to occupy premises purchased by him, but being obliged to wait for the completion of repairs, put his goods in the house and boarded his family till the repairs could be completed, it was adjudged that the property became a homestead when the goods were put therein.[57] This decision must, however, be understood as affirming that the acts referred to constitute an occupation of the property as a home, and not as dispensing with the necessity for such occupation; for other decisions in the same state, both prior and subsequent, insist that there must be something more than improvement of the property with a design to occupy it as a homestead, and that "there must be actual occupancy to give the homestead character."[58] This rule is not, however, in this state, applicable when a homestead has been exchanged or sold for the purpose of procuring a new homestead, and the latter consists of vacant lots, or is otherwise not in a condition for occupancy. In such an event the land thus acquired may be exempt, if it is held in good faith for use as a home.[59] Though the use of the premises as a home is conceded to be essential to the right to hold them as exempt as a homestead, it is not necessary that this use should have continued for any particular length of time prior to the claim for, or dedication of, the homestead. Hence, a husband who has actually resided on prem-

[56] Fogg v. Fogg, 40 N. H. 282, 77 Am. Dec. 715; Currier v. Woodward, 62 N. H. 63.

[57] Neal v. Coe, 35 Iowa. 407.

[58] Stewart F. N. B. v. Hollingsworth, 78 Ia. 575; Christy v. Dyer, 14 Ia. 438, 81 Am. Dec. 493; Elston v. Robinson, 23 Ia. 208; Givans v. Dewey, 47 Ia. 414.

[59] Vann v. Corrington, 93 Ia. 108, 57 Am. St. Rep. 256.

Digitized by Google

ises one day, intending to use and occupy them as a home, is entitled to claim them as exempt, although his family is residing elsewhere, and part of the property is rented to others and used for other than residence purposes.[60] In Kentucky, without disputing the rule that the claimant of a homestead must have actually lived upon the land, it was held that a husband, where he and his wife owned adjacent tracts of land which were cultivated as one farm, might hold his tract as a homestead, though the house in which he and his family resided was not upon his land, but upon hers.[61] The fact that the debtor was at the time of the levy building a house on the lot levied upon, with the intent to use and occupy it as his homestead, will not entitle him to its exemption.[62] In many of the states, however, it is not absolutely indispensable that the claimant should be in the actual occupancy of the property as his home, if it appears that he has purchased it for the purpose of using it as a homestead, or, whether so purchased or not, that he has formed the intent of using it, and is proceeding with reasonable diligence to build upon, or otherwise so improve it that he may occupy it as a homestead, and that his failure to occupy it up to the time when it is attempted to subject it to execution has been due to his being unable, though proceeding in good faith, to fit the property for occupancy as his home.[63] In Wisconsin, the purchase

[60] Skinner v. Hall, 69 Cal. 195.

[61] Mason v. Columbia F. & T. Co., 99 Ky. 117, 59 Am. St. Rep. 451.

[62] Patrick v. Baxter, 42 Ark. 175.

[63] Emporia etc. Asso. v. Watson, 45 Kan. 132; Ingels v. Ingels, 50 Kan. 755; Deville v. Widoe, 64 Mich. 593, 8 Am. St. Rep. 852; Franklin v. Coffee, 18 Tex. 413, 70 Am. Dec. 292; Cameron v. Gebhard, 85 Tex. 610, 34 Am. St. Rep. 838; White v. Wadlington, 78 Tex. 159; Dodkins v. Kuykendall, 81 Tex. 180; Ellerman v. Wurz

Digitized by Google

of land with intent to occupy it as a homestead, evidenced by overt acts in fitting it up for that purpose, followed within a reasonable time by its actual occupancy as a homestead, exempts it from the time of its purchase.[64] The reasons for this decision were thus stated by the court: "The acquisition of a completed homestead is seldom instantaneous. Generally, it requires years of industry and economic living. The purpose necessarily precedes the inception of the work, and that is followed by successive steps until completion is attained. The land must be acquired, the location of the dwelling-house designated, the cellar dug, the materials procured, the foundations laid, the superstructure erected, and then all fitted for a dwelling-house, before actual occupancy with the family can take place. These successive steps in the acquisition of a completed homestead, made in good faith, come within the spirit of the statute, and are each entitled to the protection afforded by it."

In Utah it is not necessary that a claimant of a homestead reside thereon, if the land is used for the support of his family,[65] while in South Carolina the right of a debtor to claim land as a homestead is not in any way dependent upon his previous use of it as such.[66]

Residing on part of the premises will not enable the claimant to impress other parts with the homestead characteristics or exemption.[67] A tract of land was

(Tex.), 16 S. W. 743; Woodbury v. Warren, 67 Vt. 251, 48 Am. St. Rep. 815.

[64] Scofield v. Hopkins, 61 Wis. 370; Shaw v. Kirby, 93 Wis. 379, 57 Am. St. Rep. 927.

[65] Kimball v. Salisbury, 17 Utah, 381.

[66] Swansdale v. Swansdale, 25 S. C. 389; Nance v. Hill, 26 S. C. 227.

[67] Casselman v. Packard, 16 Wis. 114, 82 Am. Dec. 710.

Digitized by Google

devised by a father to his son. About five acres were enclosed, and had thereon a dwelling in which the son resided. The balance had been leased by the father for farming purposes, and was being cultivated by the lessee, who resided thereon. The son filed a declaration, claiming the whole tract as his homestead; but such declaration was declared inoperative except as to the five acres.[68] "It is impossible," said the court, "to conceive of land constituting part of a 'homestead' (as the term is commonly employed) of a family residing in a certain dwelling-house, which is not used at all by those living in the dwelling-house, and the right to use or occupy which is in no manner annexed to or connected with the occupancy of the house, but which, to the contrary, is used and possessed by the occupants of another dwelling-house —who alone have the right to use and possess the land —and is part of the 'home' of those residing in that house."

But one homestead can be acquired or in existence at the same time. No man can hold two homesteads. Nor can any one occupy such a relation to two or more residences or places that he may elect which he will claim as his homestead. Before either place can be successfully claimed as exempt, it must have become the homestead of the debtor.[69] In a majority of the states the fact that premises are occupied as a homestead is all that is necessary to render them exempt from execution. But in the other states a declaration of homestead must be made and filed for record, or some other kind of record notice must be given, showing the

[68] Estate of Crowey, 71 Cal. 300.

[69] Sarahas v. Fenlon, 5 Kan. 592; Wright v. Dunning, 46 Ill. 271; Tourville v. Pierson, 39 Ill. 446; Horn v. Tufts, 39 N. H. 478; Gerrish v. Hill, 66 N. H. 171.

Digitized by Google

world that the occupants intend to insist upon their exemption right.[70]

§ 242. Of the Title Necessary to Sustain a Homestead Claim.—The legislators who enact homestead laws are, no doubt, chiefly intent upon protecting the debtor and his family, regardless of the title by which the homestead is held. Such as it is, the family is entitled to retain it. Whether it be an estate in fee-simple, free from encumbrances, or an estate of less dignity and value, or a mere possessory interest, as long as the debtor can occupy it as a home, the creditor should not be allowed to take it under his execution.[71] The object of the homestead law is to protect the possession, and if the claimant is in possession and is using the property as his homestead, it cannot be subjected to execution on the ground that he has no permanent interest therein, nor on the ground that his possession is without right, and must, therefore, be surrendered on the demand of the owner.[72] It has been said that one cannot claim

[70] The states and territories in which no formal declaration or selection of homestead is essential are Arizona, Arkansas, Connecticut, Dakota, Florida, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Montana, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolina. Tennessee, Texas, Utah, Vermont, Wyoming. and Wisconsin. But in Alabama, California, Colorado, Georgia, Idaho, Indiana. Kentucky, Maine, Massachusetts, Michigan, Nevada, New Jersey, New York, Virginia, Washington Territory, and West Virginia, the homestead must be selected, and a declaration or other notice of such selection placed on record.

[71] Brooks v. Hyde, 37 Cal. 373; McClurken v. McClurken, 46 Ill. 331; Deere v. Chapman, 25 Ill. 610, 79 Am. Dec. 350; Conklin v. Foster. 57 Ill. 104; Norris v. Moulton, 34 N. H. 392; Colwell v. Carper, 15 Ohio St. 279; Pelan v. De Bevard, 13 Iowa, 53; Johnson v. Richardson, 33 Miss. 462; Poe v. Hardie, 65 N. C. 447; Fyffe v. Beers, 18 Iowa, 4; contra, Pizzala v. Campbell, 46 Ala. 35, holding that the claimant must be the owner.

[72] Perry v. Ross, 104 Cal. 15, 43 Am. St. Rep. 66; Pendleton v.

Digitized by Google

a homestead in a house alone where he has no interest in the land, but in this case the question arose between a landlord and tenant after the latter had forfeited the right to remain in possession of the leased premises, and the landlord had recovered judgment against him. Of course, one having no right to the possession of land cannot claim a homestead therein as against the owner, and hence, as between them, a building erected on the land, and which the tenant has no longer a right to maintain there, may be subject to execution,[73] but if one has erected a building on the land of another, even without any right to do so, he may, as against all persons but the true owner, be entitled to a homestead exemption, and a third person cannot subject the building to execution on the ground that its owner has no estate in the land on which it stands, and no right to be in the possession thereof.[74]

As it is possession which is protected by the statute, and a judgment debtor is entitled to his exemption, however defective his title may be, the absence of the legal title is not material. If he has an equitable title, his right to the homestead is as perfect as if the legal title were also vested in him.[75] If the homestead

Hooper, 87 Ga. 108, 27 Am. St. Rep. 227; Felds v. Duncan, 30 Ill. App. 469.

[73] Kuttner v. Haines, 35 Ill. App. 307.

[74] Cullers v. James, 66 Tex. 494.

[75] Bartholomew v. West, 2 Dill. 291; Morgan v. Stearns, 41 Vt. 398; Cheatham v. Jones, 68 N. C. 153; Doane v. Doane, 46 Vt. 485; Blue v. Blue, 38 Ill. 18, 87 Am. Dec. 267; Allen v. Hawley, 66 Ill. 168; Orr v. Shraft, 22 Mich. 260; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 748; Tomlin v. Hilyard, 43 Ill. 300, 92 Am. Dec. 118; Farrant v. Swain, 1 L. & Eq. Reporter, 9; McCabe v. Mazzuchelli, 13 Wis. 481; Dreutzer v. Bell, 11 Wis. 114; Reeves v. Peterman, 109 Ala. 366; Whitehead v. Mundy, 91 Ga. 198; Jelinek v. Stepan, 41 Minn. 412; contra, Thurston v. Maddocks, 6 Allen, 427; Robinett v. Doyle, 2 West. L. M. 585.

Digitized by Google

claimant has conveyed the property to a trustee for the purpose of securing a debt or other obligation, the interest which the debtor retains remains subject to his homestead claim, or, in other words, whenever there is a legal title vested in one person and an equitable title in another, the latter is entitled to claim and assert his homestead rights, except in so far as they may come in conflict with paramount rights of the holder of the legal title.[76] Whether the debtor holds in fee-simple absolute, for life,[77] or for a term of years,[78] the reason for applying the exemption exists with equal force. The possession of land held under a contract to purchase may be subjected to a homestead claim.[79] If so claimed, the husband cannot dispose of it without the assent of the wife, and, if he refuse to complete his purchase, she should be permitted to do so for the protection of her interest.[80] If a third person, with notice of

[76] King v. Gotz, 70 Cal. 236; State v. Mason, 88 Mo. 222; Biddinger v. Pratt, 50 Ohio St. 719.

[77] Kendall v. Powers, 96 Mo. 142, 9 Am. St. Rep. 326.

[78] Platto v. Cady, 12 Wis. 461, 78 Am. Dec. 752; Robson v. Hough, 56 Ark. 621; Maata v. Koppola, 102 Mich. 116; Re Emerson, 58 Minn. 450; Phillips v. Warner (Tex. App.), 16 S. W. 423.

[79] Myrick v. Bill, 5 Dak. 167; Stafford v. Woods, 114 Ill. 203; Lessel v. Goodman, 97 Ia. 681, 59 Am. St. Rep. 432; Anderson v. Cosman, 103 Ia. 266, 64 Am. St. Rep. 177; Dortch v. Benton, 98 N. C. 190, 2 Am. St. Rep. 331; Ex parte Kurz, 24 S. C. 29; Seay v. Fennell, 15 Tex. Civ. App. 261; Chopin v. Runte, 75 Wis. 361; McManus v. Campbell, 37 Tex. 267; Allen v. Hawley, 66 Ill. 164.

[80] Lessel v. Goodman, 97 Ia. 681, 59 Am. St. Rep. 432; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 743. But see Farmer v. Simpson, 6 Tex. 310. In some of the states, a husband cannot claim as exempt, as a homestead, lands of his wife in his occupation. Davis v. Dodds, 20 Ohio St. 473; Holman v. Martin, 12 Ind. 553; Herschfeldt v. George, 6 Mich. 457. But, where a husband has an estate in his wife's land by virtue of the marriage, entitling him to possession for life, or otherwise, we see no reason why it should not be deemed his homestead when so occupied and dedicated. Tourville v. Pierson, 39 Ill. 446; Boyd v. Cudderback, 31 Ill. 113; Dreutzer v. Bell, 11

Digitized by Google

the contract, purchases the equitable rights of the husband and receives a conveyance or assignment from him in which the wife does not join, and thereupon obtains a conveyance of the legal title from the vendor, the homestead rights are not thereby affected. The wife retains the same right as before the transfer by her husband to complete his contract of purchase, and she cannot be put in default by the purchaser from him otherwise than by being informed by such purchaser of his purchase, and his consequent right to receive the balance of the purchase price which remains due by the terms of the original contract.[81]

It follows from what we have already said that the possession of property, irrespective of the title of the possessor, may be subjected to a homestead claim, and thereby exempted from execution, that possessors of public lands of the United States may protect their possession by claiming the same as a homestead. The character of the land is not material, provided it is actually used as a homestead, and hence the homestead exemption may exist in favor of an occupant of the public lands of the United States, whether such lands be mineral,[81a] or agricultural.[82] Title acquired after filing a declaration of homestead is also protected from forced sale, and seems to become an inseparable part of the homestead estate.[83] In California a declaration of homestead was filed by one in possession, the fee being

Wis. 114; Orr v. Shraft, 22 Mich. 260; Newton v. Clarke, 4 W. L. Gaz. 109. When the claimant's estate in the land terminates, he cannot hold the buildings as a homestead. Brown v. Keller, 32 Ill. 152, 83 Am. Dec. 258. In other words, there can be no homestead estate in a mere structure when the owner has not even a possessory interest in the soil.

[81] Alexander v. Johnson, 92 Cal. 514, 27 Am. St. Rep. 158.

[81a] Gaylord v. Place, 98 Cal. 472.

[82] Watterson v. Bonner, 19 Mont. 554, 61 Am. St. Rep. 527.

[83] Alexander v. Johnson, 92 Cal. 514, 27 Am. St. Rep. 158.

Digitized by Google

in a stranger. Afterward, prior to the sale under execution, but subsequently to the docketing of a judgment against him, the claimant became the owner of the fee. The purchaser at the sheriff's sale brought an action to recover possession. In determining that this action could not be sustained, the court justified the decision by the following train of reasoning: "At the time the judgment was docketed and became a lien, the premises constituted the homestead of the defendant, as to everybody except the owner of the land. There is no question made as to its being a homestead, if a party having a naked possession only, the title being in a stranger, can acquire a homestead right in the land so possessed. The statute does not specify the kind of title a party shall have in order to enable him to secure a homestead. It says nothing about title. The homestead right given by the statute is impressed on the land to the extent of the interest of the claimant in it—not on the title merely. The actual homestead, as against everybody who has not a better title, becomes impressed with the legal homestead right by taking the proceedings prescribed by the statute. The estate or interest of the occupant, be it more or less, thereby becomes exempt from forced sales on execution, and can only be affected by voluntary conveyances or relinquishment in the mode prescribed. The land, in this instance, as to everybody having no superior title, became the homestead of the defendant, for all the purposes of protection against forced sales and voluntary conveyances in any other than the statutory mode, as effectually as if the defendant had held the title in fee-simple. There was nothing which the sheriff was authorized to sell under execution. The fact that the defendant, after the attaching of the homestead right, ac-

Digitized by Google

quired the true title from a stranger, does not affect the question. This did not vitiate the homestead right which had attached to the land, and given an independent estate not subject to execution. The title so acquired cannot be considered as a thing separate and apart from the land subject to sale and conveyance, in the hands of the homestead claimant, so as thereby to affect the homestead right. By filing the declaration the party indicates his intention to make the land his homestead; and if he afterward acquires an outstanding title, it attaches itself to the homestead already acquired, and perfects the homestead right. If it were otherwise, a homestead could not be secured which would be safe against forced sales, unless there was at the time a perfect title in fee-simple in the party who seeks the homestead right. In case of a title in any respect imperfect, the claimant could not perfect his title to his homestead, except at the risk of losing it altogether, through the intervention of a creditor, and by the very means adopted to render it more secure; and under such a construction of the statute it would not be available to the greater portion of the class in this state who need it most." [84] In truth, the question is not one of title, but of use. Are the premises the debtor's homestead as a matter of fact? If so, such estate as he has in them is exempt from execution.[85] If, on the other hand, the estate is not consistent with the occupation of the land by the debtor as his home, it is not exempt. He may have an estate in reversion or re-

[84] Spencer v. Geissman, 37 Cal. 99, 99 Am. Dec. 248. Though a claim of homestead may protect a possessory title from execution against the occupant, it can interpose no obstacle to the recovery of the property by the true owner in an action therefor. Mann v. Rogers, 35 Cal. 316: Calderwood v. Tevis. 23 Cal. 335; McClurken, v. McClurken, 46 Ill. 327.

[85] King v. Sturges, 56 Miss. 606; Hogan v. Manners, 23 Kan. 551.

Digitized by Google

mainder. This, however valuable, gives him no right to the possession, and therefore no right to occupy the premises as his home. The homestead right, if any exists, is in the holder of the estate in possession. Hence, a reversioner or remainderman, because his estate is incompatible with the existence of a homestead in fact, cannot secure its exemption from forced sale by claiming it as a homestead.[86] In North Carolina, a judgment became a lien against a debtor while he held an estate in remainder in certain lands. Thereafter the particular estate terminated, and he became the owner in fee of the property, and conveyed it to another. It was held that the estate in remainder which he had when the judgment became a lien remained subject to execution, but that the estate to which the debtor had become entitled through the termination of the particular estate was not so subject, and hence, though the judgment creditors were entitled to sell under the judgment, the sale could not give the purchaser any immediate right of possession.[87]

With the question whether a husband or a wife can acquire any interest in the separate property of the other by claiming it as a homestead, we shall not here undertake to deal. As between the claimant and his creditors, it cannot be material whether the title of the property was in him or in his wife, if it is a homestead. By the common law a husband had the right to the possession, during his life, of his wife's real property. This right of possession, whether it amounts to a life estate or not, is sufficient to support his claim to a homestead exemption, and to prevent his creditors from subject-

[86] Murchison v. Plyler, 87 N. C. 79; Estate of Crowey, 71 Cal. 300.
[87] Stern v. Lee, 115 N. C. 426.

Digitized by Google

ing his interest, whatsoever it may be, to execution as against such claim. Where a husband occupies a tract of land as a homestead, and his creditors seek to subject it to execution against him, we cannot understand that they can support their right to do so by showing that the title to the property is vested in his wife, whether, under the statutes of the state, he has any life estate therein or not.[88] In Tennessee, however, it is said that neither a husband nor a wife is entitled to a homestead exemption out of her separate real property.[89]

§ 243. **Whether Homestead Rights can Attach to an Undivided Interest** in lands, in the absence of an express provision of the statute to that effect, is a question on which the judges have not agreed. On the one hand, it has been thought that the provisions of the homestead law contemplated that the interest to which they should be applied should be susceptible of an enjoyment in severalty. When the value of the land claimed exceeds in amount the limit of the homestead right, the statute provides means by which the homestead may be segregated; and that, as segregated, it may be set off to the judgment debtor. No such segregation could take place when the interest of the claimant was in a moiety only, for in that case there is no place which he can lawfully take into his exclusive possession. For these reasons, the claim of a cotenant to a homestead has been denied in many of the cases in

[88] Lowell v. Shannon, 60 Ia. 713; Kendall v. Powers, 96 Mo. 142, 9 Am. St. Rep. 326; Davis v. Land, 88 Mo. 436; Wilson v. Cochran, 31 Tex. 678, 98 Am. Dec. 553.

[89] Turner v. Argo, 89 Tenn. 443; Producers' N. B. v. Cumberland L. Co., 100 Tenn. 389; Adcock v. Mann (Tenn. Ch. App.), 38 S. W. 99.

Digitized by Google

which it has been questioned.[90] In California, the doctrine that a homestead could not be acquired in undivided property was frequently enforced, and was applied in some extreme cases. In one instance, the lands attempted to be dedicated as a homestead belonged to the husband and wife and their child, as tenants in common. The court could see no distinction between this case and one in which the cotenants were entire strangers to one another.[91] In another instance, the homestead had been acquired under a conveyance purporting to convey the same in severalty, and was acquired and held under the claim and belief, on the part of the occupant, that he was the sole owner. The court could not understand that these facts authorized any exception to the general rule.[92] And where, when acquired, the homestead was held in severalty, the conveyance of an undivided interest, because it turned the homestead into a cotenancy, was deemed an abandonment of the homestead.[93] So, where a tenant in common, after making a declaration of homestead, acquired the title of the other cotenants, and thus became an owner in severalty, it was held that his homestead was not protected from execution under the declaration filed while he was the owner of a moiety thereof only.[94] The statutes of Tennessee declare that "a

[90] West v. Ward, 26 Wis. 580; Wolf v. Fleischacker, 5 Cal. 244, 63 Am. Dec. 121; Elias v. Verdugo, 27 Cal. 418; Reynolds v. Pixley, 6 Cal. 167; Kellersberger v. Kopp, 6 Cal. 565; Bishop v. Hubbard, 23 Cal. 517, 83 Am. Dec. 132; Ward v. Huhn, 16 Minn. 161; Thurston v. Maddocks, 6 Allen, 429; Kingsley v. Kingsley, 39 Cal. 665; Cameto v. Dupuy, 47 Cal. 79; Henderson v. Hoy, 26 La. Ann. 156; Case M. Co. v. Joyce, 89 Tenn. 337; Cornish v. Frees, 74 Wis. 490.

[91] Giblin v. Jordan, 6 Cal. 417.

[92] Seaton v. Son, 32 Cal. 483.

[93] Kellersberger v. Kopp, 6 Cal. 565.

[94] Rosenthal v. Merced Bank, 110 Cal. 198.

Digitized by Google

homestead or real estate in the possession of, or belonging to, each head of a family, and the improvements, if any, thereon, to the value of, in all, one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family." In construing this statute the courts of that state have held that the exemption exists ordinarily in favor of a tenant in severalty only, and cannot be successfully claimed by a tenant in common. Where the land, however, is held by a husband and wife as tenants by the entireties, the fact that neither of them owns the whole of the property is held, in that state, not to be fatal to the claim of exemption. The reasoning employed by the court seems equally applicable to all other cases of a cotenancy. It was, first, that the interest involved was real estate; second, that the object of the statute was, "to stay the hand of the creditor as against a limited amount in value of real estate of whatever character, belonging to any citizen who shall be the head of a family"; third, that there was no reason for not including the head of a family who owns land as tenant by entirety with his wife, "in the scope of the law whose purpose is so humane and commendable; to the extent of his interest he may use the land for the shelter, support, and benefit of his family, as could any other man owning the absolute fee," and that he is not less deserving of protection because he does not own the entire estate; fourth, that the court could not believe, in the absence of an express declaration to that effect, "that the members of the general assembly intended to extend the benefits of the homestead exemption to citizens owning real estate in severalty, and not to those

Digitized by Google

owning it jointly with their wives as tenants by the entirety." [95]

On the other hand, in several of the states, a homestead claim upon an undivided interest has been sustained, and all distinction in this respect, between estates in severalty and estates in cotenancy, denied.[96] In California, the state in which the claim of a cotenant to exemption was first denied, the legislature so changed the statute that a part owner can hold, as a homestead, lands of which he is in the exclusive possession.[97] But we see no sufficient reason, even in the absence of statutes directly bearing upon the subject, for holding that a general homestead act does not apply to lands held in cotenancy. The fact that a homestead claim might savor of such an assumption of an exclusive right as is inconsistent with the rights of the other cotenant, and that the maintenance of such claim might interfere with proceedings for partition, forms no very satisfactory reason for denying the exemption. If the rights of the other cotenant are threatened or endangered, he alone should be permitted to call for protection and redress. The law will not sanction any use of the homestead in prejudice of his rights. But as long as his interests are respected, or so nearly respected that he feels no inclination to complain, why should some person having no interest in the cotenancy be allowed to avail himself of the law of cotenancy for

[95] Shelton v. Orr, 89 Tenn. 82.

[96] Horn v. Tufts, 39 N. H. 483; Thorn v. Thorn, 14 Iowa, 53. 81 Am. Dec. 451; Tarrent v. Swain, 15 Kan. 146; 2 Cent. L. J. 754; McElroy v. Bixby, 36 Vt. 254, 84 Am. Dec. 684; Greenwood v. Maddox, 27 Ark. 660; Robinson v. McDonald, 11 Tex. 385. 62 Am. Dec. 480; Williams v. Wethered, 37 Tex. 131; Smith v. Deschaumes, 37 Tex. 429; Bartholomew v. West, 2 Dill. 293.

[97] Statute 1868, p. 116; Higgins v. Higgins, 46 Cal. 259. See sec. 1238, California Civil Code.

Digitized by Google

his own and not for a cotenant's gain? The homestead laws have an object perfectly well understood, and in the promotion of which courts may well employ the most liberal and humane rules of interpretation. This object is to assure to the unfortunate debtor, and his equally unfortunate but more helpless family, the shelter and the influence of home. A cotenant may lawfully occupy every parcel of the lands of the cotenancy. He may employ them, not merely for cultivation, or for other means of making profits, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may of right occupy and enjoy the premises with him. Upon the land of which he is but a part owner he may, and, in fact, he frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity because the other cotenants are entitled to equal advantages in the same home. That he has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has. We have remarked with pleasure the acquiescence in these views evident in the more recent decisions. In only one instance, so far as we are aware, in which the question has been presented within the last twenty-five years, has any court, unless bound by some previous adjudication in the same state, declared an undivided interest in lands beyond the protection of the homestead laws.[98] In South Carolina, a homestead

[98] Clements v. Lacy, 51 Tex. 162; Brown v. McLennan, 60 Tex. 43; Hewitt v. Rankin, 41 Iowa, 35; In re Swearinger, 5 Saw. 52; 17 Nat. Bank. Reg. 134; McGrath v. Sinclair, 55 Miss. 89; Sherrid v. Southwick, 43 Mich. 515; Kaser v. Hass, 27 Minn. 406; Lozo v. Sutherland, 38 Mich. 168; Ward v. Mayfield, 41 Ark. 94; Danforth v. Beattie, 43 Vt. 188; McGuire v. Van Pelt, 55 Ala. 344; Snedecor v.

Digitized by Google

cannot be assigned out of lands held in cotenancy, but a right of exemption therein appears, nevertheless, to exist. To avail himself of this right, however, the claimant must seek a partition, and thus obtain an interest in severalty, and, to prevent the sacrifice of his interest through an execution sale, the court, at the instance of a judgment debtor, may restrain his creditor from proceeding against him until he has an opportunity, by partition, to convert his undivided interest into an interest in severalty.[99] In Michigan, although it is not indispensable to a claim for a homestead exemption that the claimant have an estate in severalty, yet it does appear to be necessary that the whole land out of which an exemption is claimed should not exceed the value specified in the statute, and, therefore, if it does exceed such value, the claimant is not entitled to a homestead exemption therein, though his undivided interest is of itself of less value than the amount so designated in the statute.[100] In a few of the states in which it is conceded that a homestead exemption may be maintained out of property of which the claimant owns but a moiety of the title, it is, nevertheless, insisted that he must be in the exclusive possession, or, in other words, that the claim of exemption in favor of a cotenant cannot exist unless he has substantially ousted his cotenants, and is maintaining a possession exclusive, and, perhaps, adverse to them. In support of this view it is urged that if several cotenants

Freeman, 71 Ala. 140; Brokaw v. Ogle, 170 Ill. 115; Herdman v. Cooper, 29 Ill. App. 589; Cleaver v. Bigelow, 61 Mich. 47; Powers v. Sample, 69 Miss. 67; Lindley v. Davis, 7 Mont. 206.

[99] Nance v. Hill, 26 S. C. 227; Mellichamp v. Mellichamp, 28 S. C. 125.

[100] McBride v. Putnam, 99 Mich. 469; Hooper v. McAllister, 115 Mich. 174.

Digitized by Google

are in possession of a parcel of real property, and one is entitled to a homestead exemption, the others must be equally entitled thereto, and hence that several cotenants may have a distinct claim to homestead exemption in the same parcel of realty.[101] Conceding this to be true, we cannot understand that it constitutes any insuperable, or even reasonable, objection to the right to a homestead. It is not material, when the claim is made, how imperfect may be the rights of the claimant against some other person other than his judgment creditor. It is sufficient that the latter is seeking to subject to execution what, in fact, constitutes the debtor's home. It may be that others are entitled to share, and in fact do share, that home with him. It is less valuable to him than if he were entitled to exclude, and in fact had excluded from it, all persons not members of his family. Nevertheless, this is no reason for depriving him of such comfort and protection as he is able to secure out of a home held in common with others. He is certainly within the policy, and we are not able to see that he is not within the language, of the statutes creating the homestead exemption.[102]

We have heretofore considered the right of partners to an exemption out of the personal property of the partnership. We think the principles there stated are equally applicable to partnership lands in which homestead exemptions are claimed. By partnership lands we mean lands which, in addition to standing in the names of two or more persons who happen to be partners, have been so acquired and held that, at least

[101] Brokaw v. Ogle, 170 Ill. 115.

[102] Robson v. Hough, 56 Ark. 621; Dallemand v. Mannon, 4 Colo. App. 262; Lewis v. White, 69 Miss. 352, 30 Am. St. Rep. 557; Giles v. Miller, 36 Neb. 346, 38 Am. St. Rep. 730.

Digitized by Google

in equity, they have the incidents of partnership property, and must, when necessary in the liquidation of partnership debts or accounts, be treated as personalty. Such lands are subject to the joint obligations of their owners, and each has the right to insist on their application, in case of necessity, to the satisfaction of the firm debts; and finally, neither partner has any certain definite interest therein, but only a share in such surplus as may remain after the payment of the partnership obligations. If either partner were permitted to dedicate any portion of these lands as a homestead, he could thus indirectly withdraw from the firm a portion of its capital in defiance of the partnership articles, and often to the great prejudice of his copartners and the creditors of the firm. Therefore, whatever may be his rights as against his individual creditors, we think it must ultimately be conceded that neither partner can successfully claim as a homestead any part of the firm realty, as against his copartners, nor to the prejudice of the creditors of the firm.[103] In some of the states, however, a partner is entitled to a homestead exemption out of the copartnership lands, whether the creditors of the partnership will be prejudiced thereby or not, and in these states and all others which recognize the right to a homestead exemption in favor of tenants in common, such an exemption may be claimed out of partnership lands as against persons whose debts are

[103] In re Smith, 2 Hughes, 307; C. & S. Bank v. Corbett, 5 Saw. 543; Terry v. Berry, 13 Nev. 514; Smith v. Chenault, 48 Tex. 455; Drake v. Moore, 66 Iowa, 58; Hoyt v. Hoyt, 69 Iowa, 174; Trowbridge v. Cross, 117 Ill. 109; Michigan T. Co. v. Chapin, 106 Mich. 384, 58 Am. St. Rep. 409; Aultman & Co. v. Wilson, 55 Oh. St. 138, 60 Am. St. Rep. 677; Brady v. Kreuger, 8 S. D. 464, 59 Am. St. Rep. 771.

Digitized by Google

against the members of the partnership, or some of them as individuals only.[104]

§ 244. The Use of the Homestead for Business and Rental Purposes.—The actual home of the debtor—the place where he and his family reside—must be conceded to be exempt wherever homestead laws prevail, and the claimant has complied with their requirements.[105] It is not necessary that he or they intend to occupy it for any specific time. On the contrary, his interest in the land may be a leasehold for a small number of years, after which it is the intention to discontinue the use of the property as a homestead, and to acquire another in its stead, but this will not prevent it, while continuing to be used as the home, from being protected by the homestead exemption.[106] The use of property for the purpose of supporting a family out of its rents cannot create or maintain a homestead right, where it is not the owner's intention to use it as a homestead.[107] In some of the states there are homestead rights not connected with the use of the property as a home and in which such use is not essential, as where the statutes provide that the head of a family may have what is termed a "business homestead," or, in other words, a business property on which the owner principally transacts his business, out of which he

[104] Ferguson v. Speith, 13 Mont. 487, 40 Am. St. Rep. 459; Regenstein v. Pearlstein, 32 S. C. 437, 17 Am. St. Rep. 865; Swearingen v. Bassett, 65 Tex. 267.

[105] Tumlinson v. Swinney, 22 Ark. 400, 76 Am. Dec. 432; Cook v. McChristian, 4 Cal. 23; Taylor v. Hargous, 4 Cal. 268, 60 Am. Dec. 606; McDonald v. Badger, 23 Cal. 393.

[106] Anheuser-Busch B. Assn. v. Smith (Tex. Civ. App.), 26 S. W. 94.

[107] Oppenheimer v. Fritter, 79 Tex. 99.

Digitized by Google

supports himself as the head of a family.[108] We shall not here undertake any consideration of the statutes authorizing and exempting homesteads of this character.

Premises claimed as exempt, and undisputably occupied by the debtor and his family as their home, may also be occupied for other purposes. These questions then arise: Does the occupation for other purposes make the premises any less a homestead? Does it forfeit the homestead claim, either in whole or in part? In Rhodes v. McCormick, 4 Iowa, 368, 68 Am. Dec. 663, part of a building was occupied by the claimant's family. Those parts not necessary for the family were occupied for other than homestead purposes. The court determined that the homestead character and exemption must be confined to the rooms used by the family; that part of the building was homestead and part was not.[109] This decision has not, so far as we are aware, ever been overruled.[110] In fact, it has quite recently been recognized as a controlling authority.[111] It is, however, opposed by so many adverse adjudications in other parts of the Union that its force as authority must be limited to the state wherein it was made. Indeed, we are not able to reconcile it with more recent decisions in the same state. These decisions, as

[108] Pfeiffer v. McNatt, 74 Tex. 640; Rowland v. Latimer, 57 Tex. 677; Wynne v. Hudson, 66 Tex. 1; Hargadene v. Whitfield, 71 Tex. 489.

[109] Rhodes v. McCormick, 4 Iowa, 368, 68 Am. Dec. 663.

[110] In Wright v. Ditzler, 54 Iowa, 626, Rhodes v. McCormick, 4 Iowa, 368. 68 Am. Dec. 663, is referred to as a case wherein the referees reported that the parts of the house declared not to be exempt were originally designed for a business house, and the case was therefore held not to forbid the use as a store of part of a building intended originally for family use.

[111] Mayfield v. Maasden, 59 Iowa, 517; Johnson v. Moser, 66 Ia. 36.

Digitized by Google

we understand them, consider the building as a whole, and when part is used for homestead and part for business purposes, the whole is treated as exempt, unless the different parts are so situated and constructed that the portions used for homestead purposes can be disconnected from those used for business purposes, so that the two parts may have a substantially separate use, each for its specific purpose, without impairing the value of the other. Thus, where a two-story building was used in part as a homestead, and in part as a hotel, and the rooms on the first floor used for hotel purposes, were also used by the family as a passage-way between the rooms occupied as a home, and for ingress and egress to the building, and the second story of the building, though used exclusively for hotel purposes, was inaccessible, except through that part occupied as a homestead, the whole building was declared to have the homestead character, and as such, to be exempt from execution.[112]

Nothing is more common than to use the homestead for business purposes. Spare rooms may be rented to lodgers. The claimants may carry on the business of keeping a hotel or lodging-house. They may live upstairs, and have storerooms underneath rented out to tenants. In all these cases the fact that part of the building was used for business purposes has never, except in Iowa, been regarded as a waiver of the homestead exemption as to the part so used.[113] In Wiscon-

[112] Cass County Bank v. Weber, 83 Ia. 63, 32 Am. St. Rep. 288; Groneweh v. Beck, 93 Ia. 717; Wright v. Ditzler, 54 Ia. 620.

[113] Orr v. Shraft, 22 Mich. 260; Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Moore v. Whitis, 30 Tex. 440. For exemption of hotels and lodging-houses, see Goldman v. Clark, 1 Nev. 607; Mercier v. Chace, 11 Allen, 194; Lazell v. Lazell, 8 Allen, 575; Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516.

Digitized by Google

sin, the claimant lived in the fourth story of his building, and rented the three lower stories to tenants. The entire building was adjudged exempt.[114] In Kansas, a building designed both for a brewery and for a family residence, was also regarded as entirely exempt.[115] In Iowa, a single building claimed as a homestead, and occupied partly as a residence and partly for business purposes, will undoubtedly be divided, if possible, so as to assign to the debtor the rooms and parts occupied as his home, and to permit the sale of the residue under execution.[116] So far as we have observed, this course has not been pursued in other states. Generally, the courts have considered all the uses and purposes for which the building has been constructed and used. If, upon the whole, it appeared that the chief use or purpose of the building was that of a homestead, they have not condemned the whole, nor any part to forced sale, because some of the rooms or parts have been rented out or used for business purposes;[117] and if, on the other hand, the primary use of the building is for business purposes, they have held it subject to execution, though occupied by the debtor and his family as their home. In Nebraska, although the law purports to exempt a dwelling-house, it has been held that any house in which the debtor and his family reside must be regarded as exempt as a dwelling, though it may also be used for other purposes. The court so holding said: "The evidence in the record shows that the building on the homestead premises of Corey was

[114] Phelps v. Rooney, 9 Wis. 70, 76 Am. Dec. 244.

[115] In re Tertelling, 2 Dill. 339; Klenk v. Knoble, 37 Ark. 298.

[116] Mayfield v. Maasden, 59 Iowa, 517.

[117] Klenk v. Knoble, 37 Ark. 298; Hogan v. Manners, 23 Kan. 551, 33 Am. Rep. 199; Cass Co. Bank v. Weber, 83 Ia. 63, 32 Am. St. Rep. 288.

Digitized by Google

a one and one-half story building. The first floor of this building was used by Corey for the purpose of conducting therein a mercantile business, while he and his family resided on the second floor, which was divided into several rooms or apartments, suitable for dwelling purposes. The second argument is, that the building on the homestead premises was and is not a 'dwelling-house,' within the meaning of the statute. We believe this argument wholly without merit. The law does not contemplate by the word 'dwelling-house' any particular kind of house. It may be a 'brown stone front,' all of which is occupied for residence purposes, or it may be a building, part of which is used for banking or business purposes, or it may be a tent of cloth. All that the law requires on the subject is that the homestead claimant and his family should reside in this habitation or dwelling-house, whatever be its character, on the premises claimed as a homestead." [118] In determining whether a building is a homestead it is said that the intention of the claimant in building it, as disclosed by his evidence, must be wholly disregarded, and the only competent testimony upon this issue is such as shows his visible acts, with respect to the premises and the use which he has actually made of them. Where, from such evidence, it appeared that the claimant, upon completing a building, divided it by partition walls into two rooms, each having a fireplace served by a stack chimney, constituting a part of the chimney between them, carried on the business of a retail liquor dealer in the front room, or else rented it to another who used it for the same purpose, but that such claimant, being an unmarried man, fitted up and occupied the rear room as

[118] Corey v. Schuster, 44 Neb. 269.

Digitized by Google

a bedroom, where he slept, but that he took his meals elsewhere, it was held that there could be no doubt that the primary adaptation of the building and its principal use was for business purposes, and not of domiciliary occupation. In determining that this property could not be held exempt as a homestead, the court formulated a general test, saying: "The authorities are by no means uniform as to what will or will not be considered a homestead, when the building claimed as such is in part adapted and devoted to business pursuits, and in other part used as a dwelling; but we think it may be laid down as a safe and conservative rule on that subject, that, where the trade adaptation and use of a building is incidental or secondary only to its habitation as a dwelling—where the chief use of the structure is that of a home for the owner, and some part, only not essential to this end, is fitted up and used as a shop, an office, or salesroom—it is a homestead; but when this state of facts is reversed, and the residence feature is only auxiliary to the business use—where only a relatively small part of the building is devoted to the uses of habitation, and the chief adaptation and use are those of business—the building is not a homestead, even though the occupant have no other home, and uses this for all the purposes of living. Illustrations will readily suggest themselves. For instance, the owner of a hotel, erected for and adapted to the purpose of public entertainment, would not have homestead therein, though he resided there with his family; but the owner and occupant of a private house would not be deprived of the exemption through the fact that he rented rooms to lodgers and entertained them, or even travelers, at table for a consideration. The professional man would not lose

Digitized by Google

the exemption by reason of devoting some part of his dwelling to the uses of his profession; but if a physician, for instance, should make a public infirmary of his residence, and continue to live there merely as an incident to the conduct of the hospital, we apprehend homestead would be lost." [119]

The use of a residence for hotel purposes will not forfeit the debtor's claim to hold it exempt as his homestead; [120] and the use of a hotel for residence purposes will not enable the owner to maintain a claim for its exemption as his homestead.[121] From this latter proposition, the courts of Michigan dissent. They maintain that, though a building is occupied by the claimant and his family for the sole purpose of conducting a hotel, a homestead right may attach thereto. The adoption of a contrary doctrine would, in the opinion of this court, "be a plain defiance of the statute, and render it nugatory as to those engaged in the business of hotel-keeping. The benefits of this statute are to be secured to all owners of land which they occupy with their families, and who have no other home. There is no intent apparent anywhere to exclude the families of hotel-keepers from the benefits of the act." [122]

In the cases to which we have referred, the property claimed as a homestead, though in part used for other purposes, did not contain dwellings or places of business, distinct and separate from the building occupied

[119] Garrett v. Jones, 95 Ala. 96.

[120] Harriman v. Queen Ins. Co., 49 Wis. 84; Simpson v. Biffle, 63 Ark. 28; Re Ogburn's Estate, 105 Cal. 95; Bailey v. Bauknight (Tex. Civ. App.), 25 S. W. 56; Tenney v. Wessel (Tex. Civ. App.), 26 S. W. 436; Oppenheimer v. Fritter, 79 Tex. 99.

[121] Turner v. Turner, 107 Ala. 465, 54 Am. St. Rep. 110; McDowell v. His Creditors, 106 Cal. 264, 42 Am. St. Rep. 114; Laughlin v. Wright, 63 Cal. 116.

[122] King v. Welborn, 83 Mich. 195.

Digitized by Google

by the family. The premises claimed as a homestead may contain two or more buildings, or they may have one dwelling occupied by the family, and one or more distinct structures rented out to tenants for stores, offices, or other purposes. In some of the states, it is immaterial how many structures are on the homestead lot, or to what uses it is put, provided always that it, or some part of it, is occupied as a homestead, and that, with all its improvements, it does not exceed in value the limit prescribed by statute.[123] In other states, buildings distinct from the family residence, and rented out, are not exempt as part of the homestead.[124] In Michigan, a double house, showing by its structure that it was originally intended for two families, and in fact occupied one-half by the claimant, and the other half by his tenant, was held to be a homestead only so far as occupied by its owner.[125] The sole object of the homestead laws is the securing to the families of unfortunate debtors the shelter of their homes, and to give them assurance that this much is beyond the reach of the law. The policy of these laws does not go beyond this. It does not embrace the withdrawal from execution of property not needed, nor used by the family as a part of the home. If these laws are to be interpreted with reference to the well-known

[123] Kirtland v. Davis, 43 Ga. 318; Hubbell v. Canady, 58 Ill. 425; Kelly v. Baker, 10 Minn. 154; Hancock v. Morgan, 17 Tex. 582; Umland v. Holcombe, 26 Minn. 286; Stevens v. Hollingsworth, 74 Ill. 203; Smith v. Stewart, 13 Nev. 65; Myrick v. Bill, 5 Dak. 167; Bartholomae M. Co. v. Schroeder, 67 Ill. App. 560; Rush v. Gordon, 38 Kan. 535; Bebb v. Cowe, 39 Kan. 342; Hoffman v. Hill, 47 Kan. 611; Jacoby v. Parkland D. Co., 41 Minn. 227; De Ford v. Painter, 3 Okla. 80; Webb v. Hayner, 49 Fed. Rep. 601.

[124] Casselman v. Packard, 16 Wis. 115, 82 Am. Dec. 710; Holtt v. Webb, 36 N. H. 158; Kurz v. Brusch, 13 Iowa, 371, 81 Am. Dec. 435.

[125] Dyson v. Sheley, 11 Mich. 527.

Digitized by Google

purpose of their enactment, we think they must, except where they are clearly of a different purport, be confined in their operation to that portion of the premises claimed which constitutes the claimant's home, and so as not to embrace buildings separated from the family residence and rented out to tenants.[126] If the premises are not used as a home at all, as where they are used solely as a mill, a shop, or an office, no part of them is exempt as a homestead, because no part is a homestead in fact.[127] If there are several distinct tenements, whether united into one structure or not, one tenement may be used as the home of the debtor, while the others may be used for rental or business purposes. In such cases the former is clearly exempt, because it is the homestead in fact, and the latter are as certainly not exempt, for they are no more a part of the homestead, in fact, than if they were situate in remote parts of the same town.[128]

The premises, when dedicated as a homestead, may be in the exclusive occupancy of the family. If so, the homestead estate at once attaches to the whole property. In this estate, the wife is, under many of the statutes, a joint tenant with her husband, or is at least so interested in the preservation of the whole of the premises as a homestead, that they cannot be alienated,

[126] Johnson v. Moser, 66 Iowa, 536; Cass Co. Bank v. Weber, 83 Ia. 63. 32 Am. St. Rep. 288; Semmes v. Wheatley (Miss.), 7 So. 430.

[127] Crow v. Whitworth, 20 Ga. 38; Greeley v. Scott, 2 Woods, 657; True v. Morrill, 28 Vt. 672; Stanley v. Greenwood, 24 Tex. 224, 76 Am. Dec. 106.

[128] Kaster v. McWilliams, 41 Ala. 302; McConnaughy v. Baxter, 55 Ala. 379; Wade v. Wade, 9 Baxt. 612; Schoffen v. Landauer. 60 Wis. 337; Tiernan v. Creditors, 62 Cal. 286; Ashton v. Ingle, 20 Kan. 670, 27 Am. Rep. 197; Geney v. Maynard, 44 Mich. 578; Maloney v. Hefer, 75 Cal. 422, 7 Am. St. Rep. 180; In re Ligget, 117 Cal. 352, 59 Am. St. Rep. 190; Blum v. Rogers, 78 Tex. 530.

Digitized by Google

devised, nor encumbered without her assent. She has no power to prevent her husband from erecting other dwellings, or making other improvements, nor from renting the new erections to tenants. If the new erections and their occupancy by tenants have the effect of contracting the homestead estate, so that it shall not embrace the lands on which they stand, then the estate of the wife is impaired and partially terminated without her assent. Hence, it has been held that the erection and renting of a house, on lands previously dedicated as a homestead, cannot occasion any decrease in the limits of the exempt premises.[129] This question was distinctly presented in a case in California, in which, after the dedication of a homestead, a second building was erected thereon. It did not, however, increase the value of the whole property beyond the amount which the statute permits to be exempt as a homestead. The court held that, under these circumstances, the whole property remained exempt from execution.[130] If in this case the erection of the addi-

[129] Pratt v. Pratt, 161 Mass. 276; Hancock v. Morgan, 17 Tex. 582. For a discussion of the character and uses of the premises which may successfully be claimed as a homestead, see Greeley v. Scott, 2 Cent. L. J. 361, and note thereto.

[130] Lubbock v. McMann, 82 Cal. 226, 16 Am. St. Rep. 108. The opinion of the court, so far as relevant to the subject here under consideration, was as follows: "So far as we have been able to discover, no case has before arisen, under our statutes, where the precise question now submitted has been presented. In every case where it has been held that a second tenement used for purposes other than the residence of the family has operated to prevent the homestead character from attaching to such second tenement, and the land used in connection therewith, such second tenement existed at the time of the attempted homestead selection, and was not one constructed after the homestead character had attached to the land. Here the homestead character had attached before the second building was constructed, and, reasoning from the analogy of the statutes and the cases cited, the construction of such building

Digitized by Google

tional dwelling had increased the value of the whole property beyond the limit of the homestead exemption, a much more difficult question would have been presented. The whole ground, before such erection, would have, under the statutes of the state, been impressed with the homestead character, and an interest or estate in favor of the wife would have been created therein, which, under the terms of the same statute, could not have been abandoned except by an instrument in writing, signed by her and executed with the formalities

was not an act which relieved it of such homestead character, and rendered the land subject to direct seizure and sale under execution. If the construction of this second building had increased the value of the tract claimed as a homestead to an amount in excess of the homestead exemption, or if for any other cause it had become or was of greater value than the amount of such exemption, the plaintiff would have been entitled to make the levy, as he has done in this case, not for the purpose of proceeding to sale under the execution, but as a basis of application to the proper court for proceedings under the statute for the admeasurement of such excess in value, and then for partition or sale, under the order of the court, as in the statute provided. But no provision for such a proceeding has been made, unless there is such an excess in value. And while it is true that, under the law heretofore established, this second house, with the land upon which it stands, would not have taken on the homestead character if it had been there at the time of homestead selection, but that the homestead would then, by reason thereof, have been so limited in extent as to exclude this house and its grounds, it may very well be that the legislature did not intend that the homestead should thereafter be limited in extent by reason of future improvements, even if such improvements were used for purposes of revenue rather than residence, so long as they did not increase the value beyond the limit of exemption. Whether this be so or not, we are compelled to hold that, under the facts of this case, the statutes, and the authorities cited, this whole lot is so affected with the homestead character as to be exempt from sale under execution, and there is no authority in this proceeding, or in the case in which the execution was issued, to segregate any part of the lot, and relieve it from such exemption. Whether there is such authority anywhere, we are not now called upon to decide; but without further legislative action, it would seem to be exceedingly doubtful."

Digitized by Google

prescribed in the statute. If the act of the husband in erecting the additional building subjected the property beneath it to execution, then such act defeated the estate or interest of the wife in the lands beneath the building, though she had not executed any writing upon the subject, and protested against the act of the husband. On the other hand, if the act of the husband is not operative to subject a part of the premises to execution when the additional improvements increase its value beyond the statutory limit, he may be able to invest any amount of money in additional structures upon the homestead property, and retain the whole, regardless of its value, as exempt from execution. The more recent decisions of Texas indicate that, under the statutes of this state, the homestead is so far within the control of the husband, though the statute declares that he shall not sell the homestead without the consent of his wife, that he may, by appropriating a part of it to a use withdrawing such part from its homestead character, thereby authorize a subjecting of it to execution.[131]

[131] Wynne v. Hudson, 66 Tex. 1. The argument in favor of recognizing the power of the husband to change the extent of the homestead premises by erections and improvements thereon was thus stated in this case: "The husband is the natural, as well as the legal, head of the family, and it certainly is not true, when he once acquires a homestead more than sufficient for the ordinary purposes of a home and place of business, that he is tied to it for life unless his wife may consent that a part of it may be used for some other purpose. Nor is it true, if, in good faith, and as he deems best for them who are dependent upon him, he removes from a homestead, with intent never to return to it again, that the homestead character will adhere to the abandoned home until the wife consents that it may cease. What constitutes an abandonment, as a matter of law, is easily determined, but its application to particular cases is often difficult. The facts which evidence it must be clear. If a husband, in good faith, with no intent to avoid the law, which declares that he shall not sell the homestead without the

Digitized by Google

§ 245. The Homestead Appurtenances.—The homestead is not limited to the dwelling-house. "The word 'homestead' is used in its ordinary or popular sense—or, in other words, its legal sense is also its

consent of the wife, appropriates a part of it to a use which will withdraw from it its homestead character, his act must be recognized as the exercise of the power vested in him as the head of the family, and the part so appropriated will cease to be a part of the homestead. The propriety of this rule, when the remainder of the property constitutes an adequate homestead, is too manifest. If the act of the husband be intended to violate the right of the wife and to deprive the family of a home, she is not without remedy for the protection of the family. The facts of this case, however, do not show, if the acts of the husband done, as it is claimed they were, against her silent wish, be given full effect, that she has been deprived of anything which, as a matter of right, law or justice, she ought to be permitted to hold. The former occupation of the entire enclosed block for purposes for which the homestead is given, doubtless gave to it the homestead character and protection, and this continued until there was a use made of a part of it which evidenced an intent no longer to use that part for such purposes. The constitution prohibits the sale of the homestead of the family, consisting, in whole or in part, of a husband and wife, unless the consent of the wife be given, as the law requires, but it does not declare that property once, but not continuing to be, homestead, shall not be sold by the husband alone; nor does it undertake to declare under what circumstances the homestead character shall continue when once fixed, except that it, in effect, shall cease if the property be not used for the purposes contemplated, save in a case of a temporary nonuse or renting. The place of business, whether detached from the home place or not, is as much a part of the homestead as is that on which the dwelling of the family stands, and, however situated with reference thereto, will continue to be a part of the homestead, after it has ceased to be used as a place to exercise the calling or business of the head of the family, if it be really used for the purposes of a home; but the mere will of the wife that such property shall remain homestead after the business has ceased cannot continue its character. It has, therefore, been held that the failure to use, as a place of business, a lot or lots detached from the home place would deprive such lots of their homestead character; and this is so, without reference to the consent of the wife to the abandonment of such use. Shryock v. Latimer, 57 Tex. 674. There may be expressions found in cases which would indicate that a different rule may prevail in reference to the facts

Digitized by Google

popular sense. It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including out-buildings of every kind necessary or convenient for family use, and lands used

which will constitute an abandonment, as homestead, of a part of an entire tract which has once been homestead, and of a tract detached from that on which the dwelling may be, but we are of opinion that there is no substantial difference. In the one case, as in the other, when any part of the homestead, whether consisting of one lot or more, contiguous or separated, ceases to be used, and is permanently appropriated to an inconsistent use, then the part so appropriated ceases to be a homestead. The appropriation to another use, and the intent with which this is done, may be more clearly or easily shown in the one case than in the other, but the question to be determined in the one case is the same as in the other. In other cases, in which the wife had evidenced her assent to the reduction of an area of the existing homestead on one entire parcel of land, it has been held that the homestead would be confined to the reduced area actually used for homestead purposes. Medlenka v. Downing, 59 Tex. 32; Stringer v. Swenson, 63 Tex. 12. The assent of the wife, in those cases, to the reduction of the homestead, was not given in the way of a direct assent to a sale of a part, but in the shape of declarations as to what, in fact, constituted the homestead, made in instruments which provided for the sale of the part abandoned through trust deeds declared by the constitution void, if the property covered by them remained a part of the homestead. Such declarations were but evidence of an abandonment of the property excluded from the homestead actually used, though part of the entire property which was once homestead, and were not given effect, except in so far as they tended to show that the cessation to use the property for homestead purposes was with the intention, permanently, to appropriate to uses inconsistent with those contemplated by the constitution. The use had ceased, and the question was, whether that cessation was temporary only. Whether so or not, may be shown by the acts of the husband alone. Under the facts of this case, we can have no doubt that the husband had the right to appropriate the part of the block in controversy to the use which he did, nor can we doubt, under the letter and spirit of the constitution, that thereby it ceased to be a part of the homestead. The block was larger than necessary for the uses and conveniences of a home; for the admitted fact is that, without that in controversy, 'the residence of Hudson and wife, on the same block, is an inadequate home place for their family, and has attached to it usual outbuildings, well, garden, stables, and horse-lot,' etc. He was doing business in another town, on property owned by the firm

Digitized by Google

for the purposes thereof."[132] It includes barns, stables, smokehouses, and no doubt all other outbuildings erected for family use.[133] The claimant may exercise some trade or profession requiring him to keep a shop or office. This shop or office may be erected on the homestead premises, and if so erected, seems to be regarded as appurtenant to the homestead, and as exempt from execution.[134] In Nevada, a livery stable erected on a portion of the homestead lot was adjudged to be exempt as a part of the homestead.[135] In Wisconsin, laths, lumber, shingles, and other material pro-

of which he was a member. There is not the slightest evidence of any intention on the part of the husband to wrong his wife or family. On the contrary, he evidently, in the face of financial disaster, insolvent, and on the eve of an assignment for the benefit of his creditors, sought to place a very considerable part of his estate in buildings intended to be used for no other purpose than to yield, by renting, a revenue. If the rental value of the property, per annum, is not more than ordinary interest on the sum invested, the houses and ground on which they stand would represent about thirty thousand dollars, the value of the ground alone being small. The sum thus invested ought to have gone to the creditors, and it cannot be withheld from their just claims on the ground that the wife did not consent that the houses should be built and used for a purpose which defeats the kind intentions of the husband toward his family. As well might he have built houses to rent on the entire twelve hundred feet front to the block, and ask that they be all exempted, as to ask that those built be exempted as a part of the homestead. The constitution never contemplated any such thing, and, as liberal as are its provisions, they cannot be made to protect such property."

[132] Gregg v. Bostwick, 33 Cal. 227, 91 Am. Dec. 637; Moore v. Whitis, 30 Tex. 440.

[133] Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516; Kurz v. Brusch, 13 Iowa, 371, 81 Am. Dec. 435; Reinbach v. Walter, 27 Ill. 393; Greeley v. Scott, 2 Cent. L. J. 361; Wright v. Ditzler, 54 Iowa, 620; Arendt v. Mace, 76 Cal. 315, 9 Am. St. Rep. 207; Watterson v. Bonner Co., 19 Mont. 554, 61 Am. St. Rep. 527.

[134] Pryor v. Stone, 19 Tex. 371, 70 Am. Dec. 341; Stanley v. Greenwood, 24 Tex. 224, 76 Am. Dec. 106; Stevens v. Hollingsworth, 7 Chic. L. N. 198; West River Bank v. Gale, 42 Vt. 27.

[135] Clark v. Shannon, 1 Nev. 568.

Digitized by Google

cured for the purpose of repairing the homestead dwelling, and actually deposited upon the homestead premises, are exempt from execution.[136] A lot lying adjacent to that on which the dwelling-house of the debtor is situate, and used by him and his family as an approach to the dwelling-house lot, and for various domestic purposes, may be exempt as part of the homestead.[137] A mill and various articles of machinery may be attached to the homestead property so as to constitute fixtures in the sense that they lose their character of personal property, and become real estate, and their connection with the homestead may be proper and usual and may not constitute an independent business, but only a method of more effectively using the homestead, or of preparing its products for use in the market. Where such is the case, such machinery not only becomes a part of the realty, but also partakes of the homestead character. It cannot, by an officer proceeding at the instance of a judgment creditor, be lawfully severed from the homestead or otherwise subjected to execution, where the value of the homestead as thus enhanced does not exceed the limit in value of the homestead exemption designated by the statutes of the state.[138] In Florida, a mill adjacent to the residence of the mill-owner may be a part of his homestead.[139] But generally, neither a mill nor any other

[136] Krueger v. Pierce, 37 Wis. 269; Scofield v. Hopkins, 61 Wis. 370. In Georgia, the produce, rents, and profits of a homestead are also exempt. But this exemption does not include the rent of a house disconnected from the homestead. Huff v. Bournell, 48 Ga. 338.

[137] Englebrecht v. Shade, 47 Cal. 627; Arto v. Maydole, 54 Tex. 244.

[138] White v. Morris, 66 Tex. 628, 59 Am. Rep. 634; Gentry v. Bowser, 2 Tex. Civ. App. 388.

[139] Greeley v. Scott, 2 Woods, 657.

Digitized by Google

business structure can be exempt as appurtenant to a homestead.[140]

§ 246. The Amount of Property Which May be Held as a Homestead and the Mode of Its Selection or Designation are prescribed by the statutes of each state in which the homestead exemption is known. The limit is sometimes kept within a specified area, and sometimes within a specified value. In villages and cities the area is usually small; in the country it is necessarily extended so as to embrace lands enough to make at least a small farm. The more usual course is to leave the area indefinite, but to limit the value. Where this course is pursued, the premises, though of little value when dedicated as a homestead, may, by fluctuation in prices, or by subsequent improvement, pass beyond the statutory limit. In this event the excess becomes liable to execution.[141] The whole premises may be sold, and the debtor, after paying to the defendant the amount of the exemption prescribed by statute, may apply the balance of the proceeds to the satisfaction of his writ; or the premises, if susceptible of such a partition, may be so divided as to allow the defendant to retain a homestead equal in value to the limit fixed by statute, and to permit the creditor to levy on the residue.[142] Where, in any case, the property claimed and dedicated as a homestead is greater than the statute will permit the debtor to retain, it necessarily follows that he has an interest subject to execution and that there

[140] Mourlquand v. Hart, 22 Kan. 594, 31 Am. Rep. 200.

[141] Stubblefield v. Graves, 50 Ill. 103; Gregg v. Bostwick, 33 Cal. 227, 91 Am. Dec. 637.

[142] Morgan v. Stearns, 41 Vt. 398; McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112; Hume v. Gossett, 43 Ill. 297; Fogg v. Fogg, 40 N. H. 282, 77 Am. Dec. 715; Pittsfield Bank v. Howk, 4 Allen, 347; Maxey v. Loyal, 38 Ga. 531.

Digitized by Google

should be some mode of proceeding by which the creditor may be able to reach the part subject to execution, and the debtor have set apart to him the part which is exempt. The proceedings for this admeasurement we shall hereafter consider.[143]

The duty and power to select what part of the debtor's realty he will claim to be subject to the homestead exemption is generally confided, in the first instance, to him. It is, as we have already shown, essential, in a majority of the states, that the land selected shall constitute his home, or, in other words, be used for homestead purposes. Where he is allowed property not exceeding a specified value, it is not essential that the property selected, if within that value, shall have been in actual use, and he may, therefore, include within his claim lands which remain idle, uncultivated, and unenclosed.[144] Where, as in California, a whole farm may be selected as a homestead, it cannot be successfully claimed that the part not occupied as a residence must be excluded, because it is used for business purposes, but those purposes are those only which the owner would ordinarily pursue with respect to like property. Thus, if grass grows upon the land, the owner may convert it into hay and sell it in that condition, or may take the livestock of other persons and pasture them for hire.[145]

Where a person has a right to select a homestead out of a larger tract of land, it is evident that he may, if his right of selection is absolute and uncontrollable, designate such boundaries for his homestead that his remaining land will have little or no value, or, on the

[143] Post, § 250 a.
[144] McDougall v. Meginniss, 21 Fla. 362.
[145] Kennedy v. Gloster, 98 Cal. 143.

Digitized by Google

other hand, if his interest will be promoted thereby, he may select such lands for his homestead that it will have but little value. In either event the question presented by the selection is, can a person who has been prejudiced thereby assail it and in any mode obtain relief therefrom? In Iowa, after a wife had selected a homestead out of her lands, her husband made another and different selection, and then brought suit to have her selection set aside and his accepted in lieu thereof, on the ground that she acted in bad faith and purposely included in her selection a rough, uncultivated, and practically inaccessible part of the land. The court declined to interfere on the ground that she had the right to exercise her discretion, and was not bound to claim the most productive portion of the land, and that it did not clearly appear that she acted in bad faith or for the purpose of prejudicing her husband.[146] Even when the question arises in a contest between the homestead claimant and his creditors, the courts will be reluctant to interfere with the exercise of his discretion, if it is not clear that he has exercised it dishonestly or capriciously for the purpose of annoying them or of unconscionably hindering and defrauding them in the collection of their debts. It may, under some circumstances, be difficult, if not impossible, to present this question to the courts, but whenever it is brought within their jurisdiction, they will not hesitate to act for the purpose of thwarting the debtor in his fraudulent or otherwise improper purposes.[147] In

[146] Ehrck v. Ehrck, 106 Ia. 614, 68 Am. St. Rep. 330.

[147] Jaffrey v. McGough, 88 Ala. 648. In this case the proceedings were in chancery, and the defendants were permitted to select a homestead. Their selection was set aside by the court, and its character may be inferred from this extract from the opinion: "An inspection of the remarkable diagram of the homestead attempted to

Digitized by Google

Minnesota an assignor for the benefit of creditors was permitted to make a selection of her homestead. In so doing, she left the remainder of the property without any reasonable means of access. In setting aside the selection thus made, the court said: "The selection of the debtor must be made in a reasonable manner. He cannot carve his selection out of the front part of a number of platted city lots of ordinary and usual depth, when it will leave the rear of those lots without any reasonable or proper access."[148] In truth, whenever the question has been presented to them, the courts have refused to sanction any selection made for the manifest purpose of depreciating the value of the remainder of the debtor's realty,[149] but, in all the cases coming within our observation, the statutes of the state or the peculiar circumstances of the proceeding were such that the selection of the homestead in question might well be regarded as a part of the proceeding itself, and the court was clearly invested with authority to approve or disapprove it. In many of the states the

be selected in this case—running, as its boundaries do, in a zigzag direction, and shifting toward every possible point of the compass shapeless in its capricious irregularity, and without apparent design except to take unjust advantage—a most casual inspection of it, we repeat, is the surest demonstration that such a thing cannot be tolerated by the law. It stamps itself as a freak of unbridled discretion, arbitrary and capricious in character, unreasonable in mode, and unjust in consequence. It wrongs the adjacent owners, whose lands are disfigured in shape and mutilated in their boundaries, and, if permitted would establish a rule of law which would become the ready instrument of fraud and injustice. It would be a reproach to our jurisprudence to recognize any principle which would allow it to stand, or which would tie the hands of a court of conscience so as to prevent its being effectively remedied. We perceive no reason, in this case, why the selection of the debtor's interest should not be made with reference to the lines established by the government survey."

[148] First N. B. v. How, 61 Minn. 238.

[149] Sparks v. Day, 61 Ark. 570, 54 Am. St. Rep. 279.

Digitized by Google

selection is made by a declaration in writing, filed in the proper office, and which does not require the approval of any court or officer. It cannot, by any mode of which we can conceive, be brought before any court for its approval or disapproval, unless it be competent for a judgment creditor to assail it as he would any other device or instrument conceived for the purpose of defrauding him of his rights, which is, by a bill in equity to set it aside or to enjoin the debtor from asserting it, or, where a homestead is involved, compelling him to make some selection which will fairly consider the rights and interests of all the parties to be affected thereby.

§ 247. In Several of the States, Two Distinct Parcels of Land may be held as one homestead. In these states the test of use is applied. Whenever it appears that both tracts, taken as an aggregate, are employed for homestead purposes, and do not exceed in value the amount prescribed by statute, they are both exempt.[150]

In speaking of distinct parcels of land, we do not mean lands divided by imaginary lines, nor by fences,[151] streets, highways, or watercourses; we mean tracts or lots separated from each other by the lands of other proprietors.[152] Thus, in New Hampshire, a tract

[150] Pryor v. Stone, 17 Tex. 371, 70 Am. Dec. 341; Ragland v. Rogers, 34 Tex. 617; Martin v. Hughes, 67 N. C. 293; Mayho v. Cotton, 69 N. C. 289; Melton v. Andrews, 45 Ala. 454; Reynolds v. Hull, 36 Iowa, 394; Iken v. Olenick, 42 Tex. 195; Bothell v. Sweet, 6 Atl. Rep. 646; Perkins v. Quigley, 62 Mo. 498; Shubert v. Winston (Ala.), 11 So. 200; Fulton v. Roberts, 113 N. C. 421.

[151] Little v. Baker (Tex. Civ. App.), 26 S. W. 305.

[152] Thus in Arkansas, where the statute provides for the exemption of "one town or city lot, being the residence of a householder or the head of a family," it was held that the claimant was not re-

Digitized by Google

of land a mile distant from the tract on which the claimant resided, and which he used as a pasture for his cows, was adjudged to be a part of the homestead.[153] Where contiguity on the part of two or more parcels of land is essential to their being held as one homestead, the courts are not agreed whether the touching of the two tracts at a common corner constitutes such contiguity, or, in other words, makes them a single tract within the meaning of the homestead laws. It might well be insisted that what the legislature intended was to exempt a single homestead, and that there is no reason to suppose that it cared what should be the connection between the different parcels, provided that their situation was such that they were used, and might be reasonably used, as a single homestead. It has, nevertheless, been held in at least two states that if two parcels of land touch at a common corner only, they do not constitute a single tract, and hence cannot be both exempt as the homestead of the same person, though they are such homestead in fact. These decisions insist that "'contiguous' means touching sides, adjacent, adjoining."[154] On the other hand, and we think with the better reason, it is said that "'contiguous' means in actual or close contact, touching, adjacent, near, lying adjoining," and that "when two parcels of land corner with each other, they are contiguous; they touch; and there can be nothing unreasonable or unjust in allowing the two pieces to be selected and claimed as a homestead, where they con-

stricted to one lot according to a city map, but might hold two or more lots embraced in a common inclosure, and all used as a single lot for homestead purposes. Wassell v. Tunnah, 25 Ark. 101.

[153] Buxton v. Dearborn, 46 N. H. 43.

[154] Linn Co. Bank v. Hopkins, 47 Kan. 580, 27 Am. St. Rep. 309; Kresin v. Mau, 15 Minn. 116.

Digitized by Google

stitute all the land the claimant owns, and do not exceed the legal area or value." [155]

But where the same person claims two parcels as exempt, however near they may be to each other, he must show clearly that the tract on which he does not personally reside is used as a part of the homestead.[156] In the majority of the states where the question is not controlled by statute, the lands claimed as a homestead must be contiguous. They must not be separated by the lands of another proprietor.[157] In truth, two parcels belonging to the same owner may be so disconnected in their use that they must be treated as noncontiguous, though they are not separated by the lands of another proprietor, as where the claimant has his residence upon one lot, and claims that it and another constitute his homestead, while between them he owns a third lot upon which are leased buildings, which are clearly not any part of his homestead. In such case his use of the property shows that he has separated the two parts claimed as a homestead as effectually as if the intervening lot were owned by a third person.[158]

Lands on opposite sides of a street or other public highway must be regarded as contiguous.[159] They are only severed by a mere easement. The lands in the

[155] Clements v. Crawford Co. Bank, 64 Ark. 7, 62 Am. St. Rep. 149.

[156] Methery v. Walker, 17 Tex. 593; Achilles v. Willis, 81 Tex. 169.

[157] Hornby v. Sikes, 56 Wis. 382; Walters v. People, 18 Ill. 184, 65 Am. Dec. 730; Adams v. Jenkins, 16 Gray, 146; Bunker v. Locke, 15 Wis. 635; True v. Morrill, 28 Vt. 672; Kresin v. Mau, 15 Minn. 116; Randal v. Elder, 12 Kan. 257; Mills v. Grant, 36 Vt. 269; McCrosky v. Walker, 55 Ark. 303; Brandies v. Perry, 39 Fla. 172, 65 Am. St. Rep. 164; Equitable M. Co. v. Lowry, 55 Fed. Rep. 165.

[158] Sever v. Lyon, 170 Ill. 395.

[159] Bunker v. Locke, 15 Wis. 635; West River Bank v. Gale, 42 Vt. 27; Binzel v. Grogan, 67 Wis. 147.

Digitized by Google

road belong to the adjacent owners. In Kansas, the rule is otherwise. The streets there belong to the state. Hence, lands separated by a street have between them the lands of another proprietor, and cannot be held as one homestead.[160] If, however, the owner retains the fee in a street or highway, subject only to the public easement therein, his land is not regarded, in this state, as being divided by such highway into separate tracts, and his homestead rights are not affected thereby.[161] It is difficult to conceive a more technical and unreasonable construction of the law, nor one that seems more completely to ignore the purpose of the statute, which has in view the protection of the homestead, and not technical distinctions with reference to the precise nature of the title of the public and of the owner in a highway, which happens to pass through his property without substantially impairing its usefulness as a home, and certainly without making it any the less his home in fact.

In Illinois and Minnesota a homestead can consist of but one tract or lot of land.[162] Land divided by imaginary lines, but in fact contained within a single inclosure, constitutes but one tract, within the meaning of this rule.[163] In California, the supreme court, in attempting to describe a statutory homestead, said: "It represents the dwelling-house at which the family resides, with the usual and customary appurtenances,

[160] Randal v. Elder, 12 Kan. 257.

[161] Pilcher v. Atchison etc. R. R., 38 Kan. 516, 5 Am. St. Rep. 770; Griswold v. Huffaker, 47 Kan. 690.

[162] Kresin v. Mau, 15 Minn. 116; Walters v. People, 18 Ill. 194, 21 Ill. 178, 65 Am. Dec. 730.

[163] Thornton v. Boyden, 31 Ill. 200; Arendt v. Mace, 76 Cal. 315, 9 Am. St. Rep. 207; Sever v. Lyon, 170 Ill. 395; Bouchard v. Bourassa, 57 Mich. 8; Colbert v. Henley, 64 Miss. 374; McCracken v. Adler, 98 N. C. 400, 2 Am. St. Rep. 340.

Digitized by Google

including out-buildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country, it may include a garden or farm. If situated in a city or town, it may include one or more lots, or one or more blocks. In either case it is unlimited by extent merely. It need not be in a compact body; on the contrary, it may be intersected by highways, streets, or alleys." [164]

§ 247 a. **Produce and Proceeds of Homestead.**—The exemption of homesteads in property used for agriculture is of but little benefit to the claimant, if it does not include the crops produced thereon. His occupation of the homestead in such cases is for the purpose of realizing therefrom something to support himself and family, rather than to employ it as a mere place wherein to shelter him and them from the winter's cold or the summer's heat. As well might the exemption of a debtor's only cow be held not to protect from execution the milk given by her, or the butter manufactured out of it, as the exemption of a rural homestead be held not to entitle the claimant to retain from forced sale any of the crops raised by him thereon. The statutes creating personal property exemptions, in many, if not all, of the states include therein certain produce or crops which, in the event of the judgment debtor's having a rural or agricultural homestead, are likely to be the result of his labors thereon. It has, in some of the states, been held that these statutes regulating personal property exemptions control the whole subject, and that no further exemption can be had in favor of the owner of a homestead, because what he

[164] Gregg v. Bostwick, 33 Cal. 227, 91 Am. Dec. 637; Estate of Delaney, 37 Cal. 179.

Digitized by Google

claims as exempt has resulted from his use and cultivation thereof.[165] It is believed that these decisions very materially impair the value of farm or rural homestead exemptions, and that they must be finally overruled, or else their effect annulled by further legislation. In the majority of the states in which the question has been considered, their courts have held that the produce and profits of a homestead are exempt, whether in the form of annual crops or of other profits,[166] though a recent Texas decision has deprived homestead claimants of all substantial benefit of the earlier rulings of the same court by holding that, while a crop growing upon a homestead is exempt, this exemption ceases when it has been gathered and fitted for market.[167] A claimant may lease his homestead without abandoning it, and where he does so, the rents which become due are not subject to garnishment.[168] This rule is applicable where the possession of a homestead is wrongfully withheld from the owner, and he becames entitled to compensation from the wrongdoer and recovers judgment therefor.[169] The statutes of Georgia now exempt "all produce, rents, or profits arising from a homestead." Under this statute, if a lease is executed under which a homestead claimant becomes entitled to a sum of money as a forfeiture for noncompliance, with some condition, such money must be regarded as profits, and hence as exempt.[170]

[165] Horgan v. Amick, 62 Cal. 401; Citizens' N. B. v. Green, 78 N. C. 247.

[166] Marshall v. Cook, 46 Ga. 301; Wade v. Weslow, 62 Ga. 563; Morgan v. Rountree, 88 Ia. 249, 45 Am. St. Rep. 236; Alexander v. Holt, 59 Tex. 205; Phillips v. Warner (Tex. Civ. App.), 16 S. W. 423.

[167] Coates v. Caldwell, 71 Tex. 22, 10 Am. St. Rep. 727.

[168] Morgan v. Rountree, 88 Ia. 249, 45 Am. St. Rep. 236.

[169] National Bank v. Kilgore, 17 Tex. Civ. App. 462; La Master v. Dickson, 17 Tex. Civ. App. 473.

[170] Larev v. Baker, 85 Ga. 687.

Digitized by Google

If the homestead or any part of it is converted into money or other personalty without the assent of the claimants, this involuntary conversion does not imperil their right of exemption. Thus, if the property held as a homestead exceeds in value the amount which the debtor may hold as exempt, his creditors may, in most states, institute proceedings to segregate the exempt from the nonexempt part, in order that the latter may be reached and applied to the satisfaction of their demands; and if the property is not susceptible of segregation without substantial prejudice, the whole may be sold, provided the debtor is paid the full amount of the exemption. In such an event the amount thus paid him retains its homestead character, either for some period designated by statute, or until he has, for an unreasonable time, failed to invest it in another homestead.[171]

Hence, if the improvements thereon are insured against loss by fire, the moneys falling due by reason of their loss from the peril insured against cannot be garnished.[172] The same rule applies to moneys awarded for a right of way over the homestead,[173] or any other taking of the property, or any part thereof

[171] Dearing v. Thomas, 25 Ga. 223; Maxey v. Loyal, 38 Ga. 531; Wright v. Westheimer, 2 Idaho, 962, 35 Am. St. Rep. 269; Walsh v. Horine, 36 Ill. 238; Mitchell v. Milhoan, 11 Kan. 628; Pitsfield Bank v. Howk, 4 Allen, 347; Fogg v. Fogg, 40 N. H. 282, 77 Am. Dec. 715; Freiberg v. Walzem, 85 Tex. 264, 34 Am. St. Rep. 808; Mann v. Kelsey, 71 Tex. 609, 10 Am. St. Rep. 800; Morgan v. Stearns, 41 Vt. 398; Keyes v. Rines, 37 Vt. 260, 86 Am. Dec. 707.

[172] Houghton v. Lee, 50 Cal. 101; Cooney v. Cooney, 65 Barb. 524; Cameron v. Fay, 55 Tex. 58; Reynolds v. Haines, 83 Ia. 242, 32 Am. St. Rep. 311; Chase v. Swayne, 88 Tex. 218, 53 Am. St. Rep. 742; Jones v. Whiteselle (Tex. Civ. App.), 29 S. W. 177; Swayne v. Chase, (Tex.), 30 S. W. 1049; contra, Smith v. Ratcliffe, 66 Miss. 683, 14 Am. St. Rep. 606; Wooster v. Page, 54 N. H. 125, 20 Am. Rep. 128.

[173] Kaiser v. Seaton, 62 Ia. 463.

Digitized by Google

in the exercise of the right of eminent domain,[174] and to a claim for damages resulting from the destruction of improvements of the homestead through negligence whereby they were destroyed by fire,[175] or for any other claim for injuring, damaging, or removing anything which had been incorporated within, or become a part of, a homestead.[176]

In the absence of a statute protecting from execution the proceeds of the voluntary sale of a homestead, they are doubtless not exempt.[177] In some of the states, however, if a debtor sells his homestead, and retains the proceeds for the purpose of procuring another, they continue exempt during the continuance of such purpose.[178] In truth, the tendency of the more recent legislation and decisions respecting homesteads is in favor of greater freedom on the part of the claimant to sell his homestead and with the proceeds to obtain another, and hence of holding that such proceeds remain exempt in his hands for a reasonable time, while he retains the bona fide intention of securing therewith another homestead for himself and family.[179]

[174] Brooks v. Collins, 11 Bush, 622; Wylie v. Grundysen, 51 Minn. 360, 38 Am. St. Rep. 509.

[175] Mudge v. Lanning, 68 Iowa, 641.

[176] Wylie v. Grundysen, 51 Minn. 360, 38 Am. St. Rep. 509, ante, § 235.

[177] Ante, § 235.

[178] Huskins v. Hanlon, 72 Iowa, 37; Binzel v. Grogan, 67 Wis. 147.

[179] Broome v. Davis, 87 Ga. 584; Schuttloffel v. Collins, 98 Ia. 576, 60 Am. St. Rep. 216; Mann v. Corrington, 93 Ia. 108, 57 Am. St. Rep. 256; Cooper v. Arnett, 95 Ky. 603; Goode v. Lewis, 118 Mo. 357; Macke v. Byrd, 131 Mo. 682, 52 Am. St. Rep. 649; Prugh v. Portsmouth S. B., 48 Neb. 414; Corey v. Plummer, 48 Neb. 481; Freiberg v. Walzem, 85 Tex. 264, 34 Am. St. Rep. 808; Binzel v. Grogan, 67 Wis. 147; Bailey v. Steve, 70 Wis. 316; Hoppe v. Goldberg, 82 Wis. 660; Green v. Root, 62 Fed. Rep. 191; First N. B. v. Glass, 75 Fed. Rep. 706.

Digitized by Google

§ 248. Abandonment of the Homestead.—In some of the states the abandonment of a homestead, like its selection, must be by some instrument executed as designated by statute, and filed for record. In others, the abandonment need not be attested by any written declaration, but may be inferred from the acts of the claimants. In many of the states the wife need not be consulted with respect to the abandonment of the homestead. The husband, as the head of the family, has the right to determine its place of residence, and may therefore abandon the homestead without the concurrence of his wife.[180] Even where this is the law, the desertion by a husband of his family, leaving them in the occupancy of the homestead, is not an abandonment. The presumption is that he "continues a wanderer, without a home, until he returns to his duty and his family."[181]

Abandonment generally requires a union of act and intent. Possibly there may be acts sufficient to constitute an abandonment, where there is no intent to abandon; but there can be no intent to abandon which is adequate to work an abandonment in advance of some act toward carrying the intent into execution.[182] Indeed, we do not understand that an act done for the purpose of carrying this intent into execution can become effective as an abandonment where the occupancy and use of the premises as a homestead continue. Until that use is abandoned, the purpose to abandon

[180] Brown v. Coon, 36 Ill. 243, 85 Am. Dec. 402; Titman v. Moore, 43 Ill. 169; Hand v. Winn, 52 Miss. 784.

[181] Moore v. Dunning, 29 Ill. 130, 81 Am. Dec. 301; Cary v. Tice, 6 Cal. 625; White v. Clark, 36 Ill. 285; Blandy v. Asher, 72 Mo. 35; Locke v. Rowell, 47 N. H. 46.

[182] Dunn v. Tozer, 10 Cal. 167; Dawley v. Ayres, 23 Cal. 108; Cross v. Everts, 28 Tex. 524; Moore v. Flynn, 135 Ill. 74.

Digitized by Google

may be discontinued, or, for any other cause, fail of accomplishment. In either event there has been no actual abandonment, and the homestead right remains, though there was an intention to abandon and an entry upon, or a commencement of, the acts and preparations by which, had they been completed, an abandonment would have been consummated.[183] Removal from the homestead, coupled with an intention not to return, operates at once as an abandonment thereof;[184] and declarations made by the claimant at or before such removal are admissible to show the intent with which it was made.[185]

Where the wife has an interest in the homestead, and a right to insist on its continuance, it is difficult to say what acts will be sufficient, as against her, to establish the abandonment of her homestead. She is obliged by law to accompany her husband. She cannot refuse to leave her home and accompany him to a new domicile of his selection, without violating her marital obligations, parting with the company of her children, and giving sufficient cause for an action of divorce on the ground of desertion. Hence, her removal, after a sale of the homestead by the husband alone, has been said not to present a case of abandonment, but to be the very contingency against which the statute was designed to protect her.[186] Under such a statute it is

[183] Lumpkin v. Nicholson, 10 Tex. Civ. App. 108; Caywood v. Henderson (Tex. Civ. App.), 44 S. W. 927.

[184] Fyffe v. Beers, 18 Iowa, 4, 85 Am. Dec. 577; Dunton v. Woodbury, 24 Iowa, 76; Cline v. Upton, 56 Tex. 319.

[185] Brennan v. Wallace, 25 Cal. 108; Wright v. Dunning, 46 Ill. 271, 92 Am. Dec. 257; McMillan v. Warner, 38 Tex. 410; Jarvais v. Moe, 38 Wis. 440; Anderson v. Kent, 14 Kan. 207; Holliman v. Smith, 39 Tex. 357.

[186] Taylor v. Hargous, 4 Cal. 268, 60 Am. Dec. 606; Dorsey v. McFarland, 7 Cal. 342. See Wood v. Lord, 51 N. H. 448.

Digitized by Google

evident that no acts can amount to an abandonment, unless done by the concurrence of both husband and wife.[187] These decisions are manifestly applicable only in those states by the statutes of which the abandonment of a homestead cannot become complete until a declaration thereof has been made in writing, executed with the formalities prescribed by law, and filed for record in the proper office. Where an abandonment may result from the acts of the parties without such a declaration in writing, though a conveyance of a homestead is void when made, because the wife did not assent thereto, her subsequent departure from the premises with her husband and the consequent abandonment and discontinuance of their use as a homestead may entitle his creditors to subject them to execution.[188]

The acts relied upon most frequently as evidence of abandonment are, either the acquisition of a new homestead, or the mere departure from the old homestead without acquiring a new one. Whether an abandonment has taken place is a question of fact, to be determined by a jury, or by a court acting instead of a jury.[189] In most of the states, leaving the old homestead and acquiring a new one is regarded as conclusive evidence of abandonment of the former, because the claimants cannot, at the same time, have two separate homes.[190] Where, however, no new homestead has

[187] Estate of Tompkins, 12 Cal. 114.

[188] Pipkin v. Williams, 57 Ark. 242, 38 Am. St. Rep. 241.

[189] Brennan v. Wallace, 25 Cal. 110.

[190] Thoms v. Thoms, 45 Miss. 263; Horn v. Tufts, 39 N. H. 478; Titman v. Moore, 43 Ill. 170; Wood v. Lord, 51 N. H. 448; Buck v. Conlogue, 49 Ill. 394; Trawick v. Harris, 8 Tex. 312; Howe v. Adams, 28 Vt. 544; Taylor v. Boulware, 17 Tex. 74, 67 Am. Dec. 642; Atchison S. B. v. Wheeler, 20 Kan. 625; Donaldson v. Lamprey, 29 Minn. 18; Harrell v. Kea, 37 S. C. 369.

Digitized by Google

been secured, but the claimants have absented themselves from the old one, it becomes necessary to ascertain whether their absence was designed to be permanent or temporary. For nothing else in the law of abandonment is so clearly settled as that the claimants may, for purposes of health, pleasure, business, safety, or for any cause they may deem sufficient, temporarily remove from their homestead without forfeiting their homestead rights.[191] The length of time during which the absence continues is not material, except in so far as it may support the conclusion that the absence was intended to be permanent, and therefore to be a renunciation of the homestead rights. However long the absence, it may be explained, and may be perfectly consistent with the intent to retain and use the premises

[191] Taylor v. Hargous, 4 Cal. 268, 60 Am. Dec. 606; Moss v. Warner, 10 Cal. 296; Dulanty v. Pynchon, 6 Allen, 510; Drury v. Bachelder, 11 Gray, 214; Stewart v. Brand, 23 Iowa, 478; Fyffe v. Beers, 18 Iowa, 4, 85 Am. Dec. 577; Guiod v. Guiod, 14 Cal. 506, 76 Am. Dec. 440; Dearing v. Thomas, 25 Ga. 223; Tumlinson v. Swinney, 22 Ark. 400, 76 Am. Dec. 432; Davis v. Kelley, 14 Iowa, 523; Herrick v. Graves, 16 Wis. 157; Campbell v. Adair, 45 Miss. 170; Carrington v. Herrin, 4 Bush, 624; Wetz v. Beard, 12 Ohio St. 431; Austin v. Stanley, 46 N. H. 51; Boyle v. Shulman, 59 Ala. 566; Lehmann v. Bryan, 67 Ala. 558; Thomas v. Williams, 50 Tex. 269; Hixon v. George, 18 Kan. 253; Lindsay v. Murphy, 76 Va. 428; Griffin v. Sheley, 55 Iowa, 513; Phipps v. Acton, 12 Bush, 375; Metcalf v. Smith, 106 Ala. 301; Fuller v. Whitlock, 99 Ala. 411; Pierson v. Truax, 15 Colo. 223; Moline P. Co. v. Vanderhoof, 36 Ill. App. 26; Reeseman v. Davenport, 96 Ia. 330; Zwick v. Johns, 89 Ia. 550, Crouch v. Meguiar-Harris Co. (Ky.), 42 S. W. 91; McFarland v. Washington (Ky.), 14 S. W. 354; Central Ry. L. Asylum v. Craven, 98 Ky. 105, 56 Am. St. Rep. 323; Pratt v. Pratt, 161 Mass. 276; Karn v. Hanson, 59 Mich. 380; Quigley v. McEvony, 41 Neb. 73; Edwards v. Reid, 39 Neb. 645, 42 Am. St. Rep. 607; Corey v. Schuster, 44 Neb. 269, 47 Am. St. Rep. 759; Fulton v. Roberts, 113 N. C. 421; Hines v. Nelson (Tex. Civ. App.), 24 S. W. 541; Crockett v. Templeton, 65 Tex. 134; Bowman v. Watson, 66 Tex. 295; Phillips v. Root, 68 Wis. 128.

Digitized by Google

when the reasons for the absence cease.[192] Perhaps it may be said that there must be an intention that the absence should be permanent or the homestead use abandoned. At all events, it seems, in some of the states, not to be sufficient that there was not any definite or absolute intention of returning. The going away may have been experimental, with the view of seeking employment or engaging in business, and if such employment or business proved satisfactory, then of making a permanent change of residence. If such was the case, while the intention to change the residence remains thus conditional, the absence from home does not amount to an abandonment of the homestead rights.[193]

It was held, however, that one living in the country, moving his family and household furniture to a house purchased by him in town, intending to there engage in business, did not remove the presumption of the abandonment of his rural homestead by testifying to his intention to return if he should quit business.[193a] If a husband leaves a homestead and becomes a citizen of another state, where he resides continuously with his wife and family for more than seven years, without any definite time or plan for a return, the homestead must be regarded as abandoned, though she expressed and had an intention to return at some indefinite time.[193b]

The fact that the claimants had removed from their homestead has, in a few cases, been adjudged to give

[192] Benbow v. Boyer, 89 Ia. 494; Kaeding v. Joachimstahl, 98 Mich. 78.

[193] Imhoff v. Lope. 162 Ill. 282; Painter v. Steffen, 87 Ia. 171.

[193a] Wolf v. Hawkins. 60 Ark. 262.

[193b] Perry v. Dillrance, 86 Ia. 424.

Digitized by Google

rise to the presumption that their removal was intended to be permanent, and to throw upon them the onus of showing that they intended to return.[194] But the opinion sustained by the greater number of the reported cases is that, when a new homestead has not been acquired, the absence from the old one, unless for a considerable period, does not even create a presumption of its abandonment.[195] So it is affirmed, by some cases, that removal to another state is prima facie evidence of abandonment.[196] This proposition is also denied.[197] State lines can aid but little in determining whether a removal from a homestead was intended to be permanent or temporary; and we know of no reason for affirming that a claimant who is, or has been, out of the state has thereby created any presumption different from that arising from his being within the state, if the other circumstances are the same.[198]

In Massachusetts it is held that the removal from a homestead cannot operate as its abandonment until a new one is acquired.[199] In Texas, in order to establish the abandonment of a homestead, it is not absolutely essential to show that a new one has been obtained and dedicated;[200] but if this fact is not shown, its absence can be supplied only by evidence of the most clear and unmistakable character, and entirely inconsistent with

[194] Titman v. Moore, 43 Ill. 170; Harper v. Forbes, 15 Cal. 202.

[195] Mills v. Vos Buskirk, 32 Tex. 360; Campbell v. Adair, 45 Miss. 170; Rix v. Capitol Bank, 2 Dill. 369; Ives v. Mills, 37 Ill. 73, 87 Am. Dec. 238.

[196] Orman v. Orman, 26 Iowa, 361.

[197] Rix v. Capitol Bank, 2 Dill. 369; Ives v. Mills, 37 Ill. 73, 87 Am. Dec. 238.

[198] Willbanks v. Untriner, 98 Ga. 801; Benbow v. Boyer, 89 Ia. 494.

[199] Woodbury v. Luddy, 14 Allen, 1, 92 Am. Dec. 731.

[200] Shepherd v. Cassiday, 20 Tex. 24, 70 Am. Dec. 372; McMillan v. Warner, 38 Tex. 414; Woolfolk v. Rickets, 41 Tex. 358.

Digitized by Google

the theory that the claimants had any intention of returning.[201] Mere absence for several years, or for an indefinite period, is not enough, in this state, to warrant a jury in inferring an abandonment of the homestead.[202] The question in each case is: Did the parties intend, at the time of their removal, or during their subsequent absence, to permanently relinquish their home? In order to determine this question, their declarations and conduct may be proved,[203] though neither the declaration of the parties nor their evidence in court can change the effect of acts which, of themselves, necessarily constitute an abandonment.[204] Frequently, however, the chief testimony before the court relates to the residence of the claimants away from their home. From the purpose, character, and duration of this residence, the court infers whether the intent of the parties was to remain from their homestead permanently, or only temporarily. The mere renting of the homestead for a year[205] does not show an intent to abandon. In Cabeen v. Mulligan, 37 Ill. 230, 87 Am. Dec. 247, removing to another state and residing there two years was held to be an abandonment, regardless of what the claimant might testify regarding his intent to return. In Dutton v. Woodbury, 24 Iowa, 74, an absence of three years, attempts to sell, and expressions of a desire not to return, were adjudged to be sufficient evidence of an abandonment. Very similar circumstances were, in another state,

[201] Gouhenant v. Cockrell, 20 Tex. 96; Cross v. Everts, 28 Tex. 524.

[202] McMillan v. Warner, 38 Tex. 410; Mills v. Vos Buskirk, 32 Tex. 360.

[203] Brennan v. Wallace, 25 Cal. 110.

[204] Portwood v. Newberry, 79 Tex. 337; Blackburn v. Lake Shore T. Co., 90 Wis. 362.

[205] Locke v. Rowell, 47 N. H. 46.

Digitized by Google

thought to show a desire to sell, rather than an intent to abandon.[206] In Vermont, an abandonment was presumed from a leasing for five years, living in another house, and endeavoring to sell.[207] In Wisconsin it was presumed merely from renting the homestead and going into town to live, the removal not being shown to be for any temporary purpose.[208]

The following facts and circumstances have been held sufficient to justify the finding of abandonment of homestead by the claimant, to wit: Moving from the homestead to town with his family, intending to reside there and practice law, if successful, otherwise to return;[209] removing with his family to another county, residing there for several years, repeatedly exercising the right of suffrage there, and offering to sell the homestead;[210] leaving the state by the claimant in 1875, who was followed by his wife in 1876, though she left part of the household furniture at the homestead;[211] leaving the homestead by the claimant, and going to another state, while his wife went to live with her father in another county, while the claimant's mother remained on the homestead and rented it to a tenant, with whom she boarded;[212] surrendering the homestead to the mortgagee under a lease renewable annually until the mortgage debt should be paid,[213] attempting to transfer the legal title to the wife, and removing with the family to a place three and a half

[206] Dunn v. Tozer, 10 Cal. 167.

[207] Davis v. Andrews, 30 Vt. 678. See also Cahill v. Wilson, 62 Ill. 137.

[208] Phelan's Estate, 16 Wis. 76.

[209] Kimball v. Wilson, 59 Iowa, 638.

[210] Cotton v. Hamil, 58 Iowa, 594.

[211] Leonard v. Ingraham, 58 Iowa, 506.

[212] Roach v. Hacker, 2 Lea, 633.

[213] Burson v. Dow, 65 Ill. 146.

Digitized by Google

miles distant, where the claimant and his family resided for five years, visiting the homestead only as one would look to a piece of property located so near at hand;[214] leaving a homestead for seven years and having an intention of returning thereto at some time, but not knowing when or under what circumstances the return would be made;[215] conveying a homestead by a husband, and removing therefrom with the family, none of whom returned thereto for twenty years;[216] removing to another county, there opening up a business, and continuing until long after an execution sale of the homestead, voting in the latter county, and claiming the right to do so, though the wife cherished an intention of returning, if they ever "got a little ahead";[217] acquiescing in an invalid sale of the premises under a mortgage, accepting a lease from the purchaser at such sale, and occupying the property thereunder for the period of five years;[218] leaving the property after an invalid execution sale, and failing to return, or to in any way question the sale, for more than five years;[219] ceasing to reside on the homestead premises without any casualty or necessity requiring a removal therefrom;[220] removal with the family from the state and continuing absent in another state for more than four years;[221] removing to another state for no temporary reason or purpose, and there taking up an abode, with

[214] Murphy v. Farquhar, 39 Fla. 350.
[215] Farnum v. Borders, 119 Ill. 228.
[216] Hart v. Randolph, 142 Ill. 521.
[217] Jackson v. Sackett, 146 Ill. 646.
[218] Bradshaw v. Remick, 90 Ia. 409.
[219] Newman v. Franklin, 69 Ia. 244.
[220] Moore v. Bradford, 70 Miss. 70.
[221] Kuhnert v. Conrad, 6 N. D. 215.

Digitized by Google

no certain or abiding intention of returning and re-occupying the premises.[222]

The question of abandonment must necessarily be decided upon the facts of each particular case. The intention of the claimants must be determined from their declarations made at the time of the removal or afterward, as well as from the declarations they may make under oath when attempting to sustain their claim. It is always difficult to state general rules which will be of any considerable utility in assisting the determination of issues of fact. With respect to the issue of fact arising when an abandonment is affirmed on one side and denied on the other, the difficulty of framing any general rule is insurmountable. This is because the decisions in the various states are too dissimilar in their results to warrant the inference that the principles of law governing this question have yet attained anything like a general recognition and acquiescence.[223] The abandonment of the homestead by a husband cannot prejudice the claim of his wife, where she retains possession.[224] The fraudulent act or

[222] Moore v. Smead, 89 Wis. 558.

[223] For the decisions regarding the effect of absence from a homestead as evidence of abandonment, see Wiggins v. Chance, 54 Ill. 175; Walters v. People, 21 Ill. 178; Cipperly v. Rhodes, 53 Ill. 346; Fergus v. Woodworth, 44 Ill. 377; Ives v. Mills, 37 Ill. 73, 87 Am. Dec. 238; Brinkerhoff v. Everett, 38 Ill. 263; McMillan v. Warner, 38 Tex. 410; Gouhenant v. Cockrell, 20 Tex. 96; Titman v. Moore, 43 Ill. 170; Vasey v. Trustees, 59 Ill. 188; Locke v. Rowell, 47 N. H. 46; Wood v. Lord, 51 N. H. 448; Moss v. Warner, 10 Cal. 296; Harper v. Forbes, 15 Cal. 202; Brennan v. Wallace, 25 Cal. 110; Dulanty v. Pynchon, 6 Allen, 510; Campbell v. Adair, 45 Miss. 170; Brettun v. Fox, 100 Mass. 234; Cox v. Shropshire, 25 Tex. 113; Dorsey v. McFarland, 7 Cal. 342; Dearing v. Thomas, 25 Ga. 223; Wright v. Dunning, 46 Ill. 271, 92 Am. Dec. 257; Gaines v. Casey, 10 Bush, 92.

[224] White v. Clark, 36 Ill. 285; Moore v. Dunning, 29 Ill. 130, 81 Am. Dec. 301. As long as the other members of the family continue in

Digitized by Google

conveyance of a husband does not—at least as against the wife—defeat the homestead estate. If a deed of the homestead premises is set aside as fraudulent, the homestead character reattaches to the property, and binds it as fully as though the deed had never been made.[225] In Texas, a wife who leaves the state, not intending to return, or who, for three or four years before her husband's death, deserts and abandons him, is not entitled to her homestead rights after his death.[226] In California, the fact that a wife abandons her husband and commits adultery does not destroy her interest in the homestead.[227] The waiver or abandonment of the homestead exemption, as against specified claims,

the occupancy of the homestead, no abandonment can be presumed from the absence of the husband. Locke v. Rowell, 47 N. H. 46. Hence, under the statute of Michigan protecting homesteads, "when owned and occupied by any resident of the state," the homestead of an absconding debtor cannot be seized by his creditors while his family continue to reside upon it. In re Charles C. Pratt, 1 Cent. L. J. 290. As a homestead is designed chiefly for the benefit of the wife, and as in many states she has an estate in the homestead premises very similar to that of a joint tenant, it is obvious that her rights ought not to be capable of being put in peril by the act of her husband, to which she gave no assent. Hence, her rights are not destroyed by his waiver (Allen v. Hawley, 66 Ill. 164), nor by her compulsory absence. Mix v. King, 66 Ill. 145. If she joins in a conveyance, influenced by duress, it may be set aside. Helm v. Helm, 11 Kan. 19.

[225] Riggs v. Sterling, 60 Mich. 643, 1 Am. St. Rep. 554; Dortch v. Benton, 98 N. C. 190, 2 Am. St. Rep. 331; Hugunin v. Dewey, 20 Iowa, 368; Castle v. Palmer, 6 Allen, 401; In re Detert, 7 Chic. L. N. 130; 14 Am. Law Reg., N. S., 166; Cox v. Wilder, 2 Dill. 45; Vogler v. Montgomery, 13 Am. Law Reg., N. S., 244; 54 Mo. 577; McFarland v. Goodman, 13 Am. Law Reg., N. S., 697; In re Poleman, 19 Int. Rev. Rec. 94; Sears v. Hanks, 14 Ohio St. 298, 84 Am. Dec. 378; Wood v. Chambers, 20 Tex. 247; Winn v. Meacham, 50 Miss. 34; Currier v. Southerland, 54 N. H. 475; Eckhardt v. Schlecht, 29 Tex. 129; Crummen v. Bennet, 68 N. C. 494; Dreutzer v. Bell, 11 Wis. 114. Contra, Piper v. Johnston, 12 Minn. 60.

[226] Trawick v. Harris, 8 Tex. 312; Earle v. Earle, 9 Tex. 630.

[227] Lies v. Diablar, 12 Cal. 330.

Digitized by Google

cannot be taken advantage of by the holders of other claims. Except as against the claims specified, the homestead rights continue unabated.[228]

§ 248 a. **Termination of Homestead Exemption Otherwise than by Abandonment.**—A claimant's right may terminate though he has not abandoned his homestead. If his title for any reason ceases, as where he has an estate for life or for years, and the term expires, or his estate is subject to a forfeiture, and the forfeiture occurs and is insisted upon, the homestead right does not continue against the person who has become entitled to the possession; but this is rather a cessation of his estate or interest than a termination of his homestead rights in the sense in which we here use those terms. He may have continued to be the owner of the property and to occupy it and use it for homestead purposes, and still have lost his right of exemption, as where the statute has imposed certain conditions as necessary to the right, and some of them no longer exist.[229] The most familiar illustration of this is when the statute requires a homestead claimant to be a householder or head of a family. If he ceases to have any household or family, he no longer falls within the language of the statute, and hence, in many of the states, he is denied the right of exemption.[230] This is by no means universally true. When the right of exemption has at-

[228] In re Poleman, 6 Chic. L. N. 181.

[229] Nugent v. Caruth, 32 La. Ann. 444; Chaffe v. McGehee, 38 La. Ann. 278.

[230] Santa Cruz v. Cooper, 56 Cal. 339; Haynes v. Schaefer, 96 Ga. 743; Towns v. Mathews, 91 Ga. 546; Rutledge v. McFarland, 75 Ga. 774; Blalock v. Denham, 85 Ga. 646; Gallighar v. Payne, 34 La. Ann. 1057; Cooper v. Cooper, 24 Oh. St. 488; Burns v. Jones, 37 Tex. 50; Givens v. Hudson, 64 Tex. 471.

Digitized by Google

tached because one was the head of a family, it is a cruelty which the legislature cannot have intended to compel him or her to surrender the homestead, if it is still occupied and used as such, because in old age he or she is left a widower or widow, when the children are either dead or have become of full age, and are no longer dependent on parental care. Courts are very reluctant to hold, in such circumstances, that the homestead right has terminated.[231] If the exemption exists only in favor of residents of a state, there can be no doubt that their removal to, and becoming residents of, another state, terminates their homestead rights.[232]

The divorce of a husband and wife may terminate the homestead rights of one or both. If they have no children, neither is any longer the head of a family, and hence neither can be entitled to a homestead, except the statute confers the right of exemption upon unmarried persons, not the heads of families.[233] In California, however, it has recently been held, under the peculiar phraseology of the statute in force there, that the divorce of a husband and wife does not destroy her homestead right in her separate property, though she has no children, so as to subject it to a judgment for her debts.[234] Of course, one of the inevitable results of a divorce is, that the two spouses no longer continue

[231] Stanley v. Snyder, 43 Ark. 429; Gray v. Patterson, 65 Ark. 373; Roth v. Insley, 86 Cal. 134; Kimbrell v. Willis, 97 Ill. 494; Stults v. Sale, 92 Ky. 5, 36 Am. St. Rep. 575; Doyle v. Coburn, 6 Allen, 71; Silloway v. Brown, 12 Allen, 30; Beckman v. Meyer, 75 Mo. 333; Leake v. King, 85 Mo. 413; Roberts v. Greer, 22 Nev. 318, 58 Am. St. Rep. 755; Webb v. Cowley, 5 Lea, 722; Wilkinson v. Merrill, 87 Va. 513; Towne v. Rumsey, 5 Wyo. 11.

[232] Cofer v. Scroggins, 98 Ala. 54, 39 Am. St. Rep. 54; Trimmier v. Winsmith, 41 S. C. 109.

[233] Bahn v. Starcke, 89 Tex. 203, 59 Am. St. Rep. 40.

[234] City Store v. Cofer, 111 Cal. 482.

Digitized by Google

members of the same family, and neither can have any rights dependent upon his or her being a member of the family of the other.[235] Therefore, if a divorce is granted, which is silent upon the subject of homestead rights, such rights, if they continue after the divorce, vest solely in the spouse in whom the title to the property was at the granting of the divorce.[236] So far as creditors are concerned, if the spouse remaining, and entitled to remain, in possession of the homestead, after the divorce, continues to be the head of a family, he is still, therefore, entitled to his homestead exemption.[237] In some of the states the law of community property prevails, by virtue whereof, upon the granting of a divorce, the husband and wife must thereafter be treated as tenants in common, unless the decree provides for the partition, or some other disposition, of the property. In those states where a cotenant is entitled to a homestead exemption in the lands of a cotenancy, it may happen, after a divorce, that the spouse remaining the head of the family is entitled to hold his or her undivided one-half as exempt from execution, while the interest of the other may be subjected to the payment of his or her debts.[238] In California it was held that, where a decree of divorce directed a partition of the homestead between

[235] Burns v. Lewis, 86 Ga. 591.

[236] Skinner v. Walker, 98 Ky. 729; Kern v. Field, 68 Minn. 317; Biffle v. Pullman, 114 Mo. 50; Rosholt v. Mehus, 3 N. D. 513; Brady v. Kreuger, 8 S. D. 464. 59 Am. St. Rep. 771; Hall v. Fields, 81 Tex. 553; Arp v. Jacobs, 3 Wyo. 496.

[237] Blue v. Blue, 38 Ill. 19, 87 Am. Dec. 267; Vanzant v. Vanzant, 23 Ill. 536; Redfern v. Redfern, 38 Ill. 509; Bonnell v. Smith, 53 Ill. 383; Byers v. Byers, 21 Ia. 268; Woods v. Davis, 34 Ia. 265; Blandy v. Asher, 72 Mo. 27.

[238] Kirkwood v. Domnau, 80 Tex. 647, 26 Am. St. Rep. 770; Southwestern M. Co. v. Swan (Tex. Civ. App.), 43 S. W. 573.

Digitized by Google

the husband and wife, and allotted to each his or her share, to be held in severalty, that such divorce was as effective as a declaration of abandonment, and that thereafter neither party was entitled to a homestead exemption in the property.[239] This decision has not, so far as we are aware, been questioned by the court which rendered it, but we know not how to reconcile it with a later opinion of the same tribunal.[240]

§ 249. Liabilities against Which the Homestead Exemption may be Asserted.—We think it must now be conceded that a homestead law cannot be asserted against liabilities in existence at the time of its passage.[241] Such a law withdraws so material a portion of the debtor's property from the reach of his creditors that, if enforced against prior liabilities, it must necessarily "impair the obligation of contracts," as that term is used in the constitution of the United States. The law in force at the creation of a debt must control, and if at that time the defendant could not have claimed a homestead exemption as against a judgment for the debt, he cannot claim it afterward, though, in the meantime, a statute has been enacted purporting to create such an exemption.[242] If there be any exception to this rule, it must be where the defendant is able to show that he has other property subject to execution sufficient to satisfy the judgment, and hence that the

[239] Shoemake v. Chalfant, 47 Cal. 432.

[240] City Store v. Cofer, 111 Cal. 482.

[241] See ante, § 219; Gunn v. Barry, 15 Wall. 610; 5 Leg. Gaz. 193; The Homestead Cases, 22 Gratt. 266, 12 Am. Rep. 507; Milne v. Schmidt, 12 La. Ann. 553; Jones v. Brandon, 48 Ga. 593; Edwards v. Kearzey, 96 U. S. 595, 17 Alb. L. J. 346.

[242] Davis v. Dunn, 74 Ga. 36; Gallagher v. Smiley, 28 Neb. 189, 26 Am. St. Rep. 319; Jackson v. Creighton, 29 Neb. 310; Horbach v. Smiley, 54 Neb. 217; Campbell v. Potts, 119 N. C. 530; Hosford v. Winn, 26 S. C. 130.

Digitized by Google

assertion of the homestead exemption cannot prejudice his creditor.

In considering liabilities arising subsequently to the homestead law, we shall treat 1. Of simple liabilities; 2. Of liabilities secured by lien on the homestead property. Simple liabilities may be divided into two classes: 1. Those which were created before the property was impressed with the homestead character; 2. Those which were created after the property assumes such character. As a general rule, executions founded upon simple liabilities, whether arising before or after the creation of the homestead, cannot be levied upon it. But as to antecedent liabilities, this rule is by no means universal. The holders of these liabilities may have permitted them to be contracted because the debtor was seised of valuable property apparently subject to execution; and it may be regarded as an act of bad faith on his part to withdraw a substantial part of his assets from execution by dedicating them as a homestead. Hence, in several of the states the statutes in regard to homestead exemptions have not shielded the claimant from certain pre-existing debts.[243] While the object of these statutes was doubtless to prevent the debtor from obtaining delusive credit from the possession and apparent ownership of property, and then withdrawing such property from the grasp of his debtors by interposing a homestead claim, yet the language of some of them indicates either a very indistinct view of the wrong to be remedied, or else a lamentable want of

[243] Delavan v. Pratt, 19 Iowa, 429; Hyatt v. Spearman, 20 Iowa, 510; Stevens v. Stevens, 10 Allen, 146, 87 Am. Dec. 630; Clark v. Potter, 13 Gray, 21; Rice v. Southgate, 16 Gray, 143; Lawton v. Bruce, 39 Me. 484; Kinder v. Lyons, 38 La. Ann. 713; Berry v. Ewing, 91 Mo. 395; Gross v. Washington (Tenn. Ch. App.), 38 S. W. 442; Robinson v. Leach, 67 Vt. 128, 48 Am. St. Rep. 807.

Digitized by Google

skill in prescribing the remedy; for instead of subjecting the homestead to debts contracted prior to its being impressed with the homestead character, they subject it to debts contracted prior to its purchase, or prior to the recording of the deed therefor.[244] It is immaterial that the debt was contracted in another state.[245] So, where a debt was in existence prior to the homestead, and was thereafter outlawed by operation of the statute of limitations, and was subsequently renewed, it was still considered as having an existence anterior to that of the homestead, and as being a debt for which the homestead was liable to be sold.[246] The construction of these statutes has, however, to some extent been controlled by the idea that their object was merely to prevent the debtor from withdrawing from execution lands upon which his creditors probably and rightfully relied for the satisfaction of their debts. Hence, it has been held that lands acquired by descent[247] or gift,[248] or purchased with the proceeds of a

[244] Code Iowa, § 2976; Gen. Stats. Ky. 1894, sec. 1702; Rev. Stats. Vt., 1880, sec. 1901; Rev. Stats. Mo., 1889, sec. 5441; Farra v. Quigly, 57 Mo. 284; West River Bank v. Gale, 42 Vt. 27; Lamb v. Mason, 45 Vt. 500; Shindler v. Givens, 63 Mo. 394; Lincoln v. Rowe, 64 Mo. 138.

[245] Laing v. Cunningham, 17 Iowa, 510; Brainard v. Van Kuran, 22 Iowa, 264.

[246] Sloan v. Waugh, 18 Iowa, 224; Pryor v. Smith, 4 Bush, 379; Mills v. Spaulding, 50 Me. 57. The renewal of an old debt by giving another note, security, or other evidence of indebtedness, whether of a higher nature or not, does not extinguish the original debt. Hence, where the homestead could have been sold under a judgment for it, such sale may take place under a judgment given on the renewed note or other evidence of indebtedness. Kibbey v. Jones, 7 Bush, 243; Ladd v. Dudley, 45 N. H. 61; McLaughlin v. Bank of Potomac, 7 How. 228; Lowry v. Fisher, 2 Bush, 70, 92 Am. Dec. 475; Weymouth v. Sanborn, 43 N. H. 171, 80 Am. Dec. 144; Reed v. Defebaugh, 24 Pa. St. 495.

[247] Jewell v. Clark, 78 Ky. 398.

[248] Holcomb v. Hood, 1 S. W. Rep. 401 (Ky.).

Digitized by Google

prior homestead,[249] may be held as exempt, regardless of antecedent debts. The fact that a debtor is insolvent or in failing circumstances will not, unless the statute declares otherwise, prevent him from dedicating as a homestead real estate previously owned by him, nor even from purchasing real property with his personal assets and exempting it as a homestead.[250] Unless the statute provides otherwise, the homestead exemption must be held applicable to debts contracted before the homestead was acquired or dedicated. Every person is presumed to know the law, and cannot insist that he made a loan or extended credit on the theory that the debtor had property subject to execution. The creditor is charged with notice that the law will permit the debtor to dedicate as a homestead real property already used as such, and will also permit him to acquire such property by the use of moneys or other property not exempt from execution, and to impress it, when acquired, with the homestead character.[251] General provisions declaring that no exemption shall exist against

[249] Pearson v. Minturn, 18 Iowa, 36; Farra v. Quigly, 57 Mo. 284; Benham v. Chamberlain, 39 Iowa, 358; Sargent v. Chubbuck, 19 Iowa, 37.

[250] Randall v. Buffington, 10 Cal. 491; Hawthorne v. Smith, 3 Nev. 182, 93 Am. Dec. 397; Culver v. Rogers, 28 Cal. 520; Cipperly v. Rhodes, 53 Ill. 346; In re Henkel, 2 Saw. 305; North v. Shearn, 15 Tex. 174; Edmonson v. Meacham, 50 Miss. 35. Contra, Riddell v. Shirley, 5 Cal. 488; Pratt v. Burr, 5 Biss. 36; Burnside v. Terry, 51 Ga. 190.

[251] Peterson v. Little, 72 Iowa, 223; Meador v. Meador, 88 Ky. 217; Peake v. Cameron, 102 Mo. 568; Comstock v. Bechtel, 63 Mo. 536; O'Donnell v. Segar, 25 Mich. 367; Jacoby v. Distilling Co., 41 Minn. 227; O'Shea v. Payne, 81 Mo. 516; Paxton v. Sutton, 53 Neb. 81, 68 Am. St. Rep. 589; Vanstory v. Thornton, 112 N. C. 196, 34 Am. St. Rep. 499; Woodlie v. Towles, 9 Baxt. 592; Dye v. Cook, 88 Tenn. 275, 17 Am. St. Rep. 882; Kelly v. Sparks, 54 Fed. Rep. 70; First N. B. v. Glass, 79 Fed. Rep. 706.

Digitized by Google

debts of a specified class, as, for instance, the wages of clerks, mechanics, and laborers, will be construed as applying to personal property exemptions only, and hence homesteads are not subject to execution on judgments for demands of the character specified.[252] In truth, the legislature may exempt a homestead from whatsoever debt it pleases, provided only that the exemption can have no retroactive operation. It may even prevail against a mortgage executed before the homestead declaration was filed, if the statute exempts the homestead from forced sale except under mortgages duly executed and recorded.[253] When a court has jurisdiction of a husband and wife for the purpose of decreeing a divorce and adjusting their property rights, it may decree alimony to her, and it has been held that an execution for such alimony may be satisfied out of the homestead on the ground that it was designed for the protection of the family and cannot be employed to defeat the rights of the wife as a member thereof.[254] Notwithstanding a divorce, the husband may remain the head of a family. If so, the rights of his infant children are as worthy of consideration as those of his divorced wife, and we believe there is no sufficient reason, either in the language or purpose of the statute, to warrant the holding that the homestead is subject to execution on a judgment for alimony.[255]

A homestead is liable for the payment of fiduciary debts created by the owner, if there is in the state a constitutional or statutory provision making the homestead answerable for all liabilities incurred by any pub-

[252] Fox v. McClay, 48 Neb. 820.
[253] Lee v. Murphy, 119 Cal. 364.
[254] Best v. Zitavern, 53 Neb. 604.
[255] Biffle v. Pullman, 114 Mo. 50.

Digitized by Google

lic officer, officer of a court, other fiduciary, or any attorney at law for money collected.[256] Such provisions of law include the sureties of a public officer, and their homesteads may be subjected to sale to pay a fiduciary debt created by their principal by a misappropriation of funds belonging to the public,[257] tax collectors,[258] sheriffs,[259] and guardians, [260] and the sureties of such officers are within the meaning of this rule. The homestead of an agent is liable for money or property misappropriated by him in the discharge of a trust bestowed upon him by his principal.[261] But the homestead of an attorney is not subject to liability for money received by such attorney to indemnify him against liability as surety for his client, and by him converted to his own use. In such case the money is not received by him in his capacity as attorney, but as security to protect himself against loss.[262] A surety on the bond of a defaulting officer or fiduciary, who pays the amount of his principal's default, is entitled to be subrogated to the rights of the state, county, or person who might have subjected the homestead of such principal to the payment of his defalcation, and the surety may subject the homestead of his principal to the payment of his

[256] Commonwealth v. Ford, 29 Gratt. 683; Vincent v. State, 74 Ala. 274; Schuessler v. Dudley, 80 Ala. 547, 60 Am. Rep. 124; Gilbert v. Neely, 35 Ark. 25; Commonwealth v. Cook, 8 Bush, 220, 8 Am. Rep. 456; Bridewell v. Halliday, 37 La. Ann. 410.

[257] Commonwealth v. Ford, 29 Gratt. 683; Commonwealth v. Cook, 8 Bush, 220, 8 Am. Rep. 456.

[258] Schuessler v. Dudley, 80 Ala. 547, 60 Am. Rep. 124; Commonwealth v. Ford, 29 Gratt. 683.

[259] Commonwealth v. Cook, 8 Bush, 220, 8 Am. Rep. 456.

[260] Gilbert v. Neely, 35 Ark. 24.

[261] Bridewell v. Halliday, 37 La. Ann. 410.

[262] Sanders v. Sanders, 56 Ark. 585.

Digitized by Google

demand.[263] Under statutory enactments making the real estate of a public officer liable for his defalcation or misappropriation of public money, but not especially mentioning his homestead, it has been decided that his homestead is not liable for a fiduciary debt, arising from his defalcations in office;[264] and a homestead assigned to a debtor, in bankruptcy proceedings, is exempt from liability for a fiduciary debt which has not been discharged by such proceedings.[265]

§ 249 a. Claims for Moneys Fraudulently Invested in the Homestead.—While a claim or declaration of homestead can rarely be avoided because a fraud upon the creditors of the claimant, yet there may sometimes be debts against which the exemption will not be allowed, because its allowance will perpetuate a fraud. In an early California case, a sale of personal property by an insolvent, for the purpose of raising moneys to discharge liens existing on the seller's homestead, was adjudged to be fraudulent and void because of its direct tendency to delay and defraud his creditors.[266] But in this case the right to hold the homestead as exempt was not involved. It is true, the court said: "It would seem to be only fair that the homestead should remain answerable for the debts charged upon it, and not, after becoming a source of credit, be relieved intentionally by the disposition of all the other property of the debtor, leaving nothing for the satisfaction of the other creditors"; but it does not appear that the court would have subjected the homestead itself to execution be-

[263] Gilbert v. Neely, 35 Ark. 24; Schuessler v. Dudley, 80 Ala. 547, 60 Am. Rep. 124.

[264] Reu v. Driskell, 11 Lea, 642; Hume v. Gossett, 43 Ill. 297.

[265] Simpson v. Houston, 97 N. C. 344, 2 Am. St. Rep. 297.

[266] Riddell v. Shirley, 5 Cal. 488.

Digitized by Google

cause the debtor had sold his personal assets to discharge liens existing thereon. Where land belonged to two copartners, who, on becoming insolvent, in order to hinder and delay their creditors divided it, and one of them then filed a declaration of homestead on the part assigned to him in the division, the firm creditors were permitted to levy upon and sell the homestead for the firm debts. But this was on the ground that the land, while held by the partnership, could not be dedicated as a homestead, and the jury had found that the object of the conveyance was fraudulent. It was the conveyance that was disregarded as fraudulent. Such being the case there was no estate in the debtor upon which the declaration of homestead could operate.[267] If moneys are fraudulently taken or procured, and then employed to discharge a valid lien existing on the homestead, persons equitably entitled to such moneys may obtain relief by proper suit in chancery, wherein the moneys so fraudulently taken and paid may be decreed to be a lien on the homestead; or in other words, the lien fraudulently discharged may be revived and enforced for the benefit of the complainants, who would otherwise be defrauded for the benefit of the claimant. Neither husband nor wife has any just cause of complaint against such a decree, for it merely wrests from them the fruits of the fraud, and "neither ever had, or ever could have, any right founded on the fraudulent appropriation of the funds of other parties."[268]

Every person is charged with notice of the existence of the exemption laws and of the right of his debtor to take advantage of their provisions, and the debtor is

[267] Bishop v. Hubbard, 23 Cal. 514, 83 Am. Dec. 132.

[268] Shinn v. Macpherson, 58 Cal. 596; Red Jacket Tribe v. Gibson, 70 Cal. 128.

Digitized by Google

not guilty of fraud in so doing, though in so doing he may see that he is or soon will become unable to meet his obligations either as they fall due or otherwise. He may so change or invest his property as to entitle himself to the full benefit of the exemption laws. The property which he has, though it is subject to execution, must still be regarded as his until some lien has attached thereto. He may sell it for any purpose not forbidden by law; he may, by purchase or exchange, convert property which he cannot claim as exempt into homestead property, and if so, it cannot be subjected to execution, though what he did was for the express purpose of obtaining property exempt from forced sale and to that extent of hindering his creditors in obtaining satisfaction of their demands.[269]

§ 249 b. Exemption against Judgments for Torts.— Whether a homestead is exempt from execution upon a judgment founded in tort is, of course, dependent upon the language of the statutory or constitutional provision creating the exemption. It is true that in Michigan, under a provision exempting a homestead from forced sale for any debt contracted after the adoption of the constitution, it was held to include judgments of every character, whether founded in tort or in contract, upon theory that the word "debt" was one of large import, including debts of record or by judgment.[270] A like view has prevailed in several of the states, and has been defended upon the ground that

[269] McPhee v. O'Rourke, 10 Colo. 301, 3 Am. St. Rep. 579; Wells v. Anderson, 97 Iowa, 201, 59 Am. St. Rep. 409; Paxton v. Sutton, 53 Neb. 81, 68 Am. St. Rep. 589; Chase v. Swayne, 88 Tex. 218, 53 Am. St. Rep. 742; Becker v. Meyer, 43 Fed. Rep. 702; Kelly v. Sparks, 54 Fed. Rep. 70; First N. B. v. Glass, 79 Fed. Rep. 706.

[270] Mertz v. Berry, 101 Mich. 32, 45 Am. St. Rep. 379.

Digitized by Google

"the object of these homestead laws was to furnish a shelter for the wife and children, which ought not to be taken away or lost by the act of the husband alone. The principle must equally exempt the homestead from sale under a judgment for a fine and costs rendered in a criminal prosecution for a misdemeanor. The wife is not to suffer for the wrongful act of the husband." [271] We believe, however, that where the language of the exemption upon its face refers to contracts or contract debts, and uses language which may fairly be restricted to liabilities resting upon contract, the exemption will, in a majority of the states, be restricted to judgments founded upon obligations of that character.[272]

§ 249 c. Exemption against Judgments in Favor of the State or the United States.—The application of the maxim, that the sovereign is not bound by any statute, unless expressly named therein, to the homestead laws, would very generally result in their being held unavailing against a writ in favor of the state or of the United States. So far as the burdens of taxation are concerned, doubtless homesteads must bear their share. With respect to judgments in civil actions in favor of a state, there have been decisions holding that the maxim

[271] Conroy v. Sullivan, 44 Ill. 451; Loomis v. Gerson, 62 Ill. 11; Kruger v. Le Blanc, 75 Mich. 424; State v. Pitts, 51 Mo. 133; Dillinger v. Tweed, 66 N. C. 206; Gill v. Edwards, 87 N. C. 76; Smith v. Omans, 17 Wis. 395; In re Radway, 3 Hughes, 609.

[272] McLaren v. Anderson, 81 Ala. 106; Meredith v. Holmes, 68 Ala. 190; Williams v. Borden, 69 Ala. 433; Vincent v. State, 74 Ala. 275; Hollis v. State, 59 Ark. 211, 43 Am. St. Rep. 28; Davis v. Heuson, 29 Ga. 345; State v. Melogue, 9 Ind. 196; Ries v. McClatchey, 128 Ind. 125; McClure v. Braniff, 75 Iowa, 38; Schouton v. Kilmer, 8 How. Pr. 527; Lathrop v. Singer, 39 Barb. 396; Robinson v. Wiley, 15 N. Y. 489; Lane v. Baker, 2 Grant's Cas. 424; Kenyon v. Gould, 61 Pa. St. 292; Whiteacre v. Rector, 29 Gratt. 714, 26 Am. Rep. 420; Burton v. Mill, 78 Va. 468.

Digitized by Google

above referred to is applicable, and therefore that the exemption cannot be allowed, in the absence of words in the statute showing an intent to bind the state.[273] The object of these statutes is to protect those in humble circumstances from becoming houseless and homeless, and from thereby being made a burden on the state. To the general policy which the state prescribes for its citizens upon this subject it may well be deemed to assent, when its own interests are involved. Hence, the almost unanimous concurrence of the authorities in declaring that the homestead exemption may be urged against a state or the United States with like effect as against a private citizen.[274]

With respect to taxes, we have already stated that there can be no doubt that homesteads are subject thereto, and, if so, it must follow that the state may provide adequate modes to enforce payment of such taxes, and to that end may authorize the sale of homesteads, and, further, that a general provision authorizing the sale of real property for taxes must be as applicable to homesteads as to other realty.[275] A homestead, however, is not subject to sale for taxes imposed upon it and other property,[276] nor apparently to an execution upon a judgment in personam against its

[273] Brooks v. State, 54 Ga. 36; Commonwealth v. Cook, 8 Bush, 220, 8 Am. Rep. 456; overruled, Commonwealth v. Lay, 12 Bush, 283, 23 Am. Rep. 718.

[274] Salentine v. Fink, 8 Biss. 503; Fink v. O'Neil, 106 U. S. 272; Commonwealth v. Lay, 12 Bush, 283, 23 Am. Rep. 718; Hume v. Gossett, 43 Ill. 297; Loomis v. Gerson, 62 Ill. 12; State v. Pitts, 51 Mo. 133; Gladney v. Deavors. 11 Ga. 89; Central Ky. L. Asylum v. Craven, 98 Ky. 105, 56 Am. St. Rep. 323.

[275] Colquitt v. Brown, 63 Ga. 440; Lamar v. Sheppard, 80 Ga. 25; Douthett v. Winter, 108 Ill. 330; Tucker v. Tucker, 108 N. C. 235; Lufkin v. Galveston, 58 Tex. 545.

[276] Wright v. Straub, 64 Tex. 64.

Digitized by Google

owner, though such judgment was founded upon a demand for taxes levied against it.[277]

With respect to local assessments levied upon the property for the purpose of street and other like improvements, there is a difference of opinion. In Texas such a charge has been held to be a debt within the meaning of the constitution, against which the homestead is exempt from execution.[278] We believe this an unreasonable construction of the law.[279] Charges of this character are not debts, and do not create a personal liability. The sovereign is authorized to impose them upon property on the theory that it is benefited thereby. It would be a strange construction of the homestead law which left all the property upon a given street subject to assessment for its improvement, save that which was used for homestead purposes. As to it, we suppose that the general public must be taxed; for the expense of improving it certainly cannot be a charge on the other property fronting on the street.

§ 249d. Sale of Homesteads to Satisfy Judgment Liens.—The lien of a judgment and of an execution is almost universally regarded as arising from the right to sell property thereunder. And hence, where the right of sale cannot be asserted, the existence of the lien must be denied.[280] It would follow, as a logical result, from the application of this general principle, that a judgment rendered after the creation and before the abandonment of a homestead cannot be a lien thereon; and, as a result of this last proposition, it must follow that a homestead may be sold or mortgaged, and

[277] Douthett v. Winter, 108 Ill. 330.
[278] Higgins v. Bordages, 88 Tex. 453, 53 Am. St. Rep. 770.
[279] Perine v. Forbush, 97 Cal. 305.
[280] Freeman on Judgments, §§ 339, 340, 355.

Digitized by Google

that the title of the vendee or mortgagee will be paramount to that of a prior judgment creditor. If the property was a homestead, and as such exempt from execution, the exemption right is not lost by the transfer of the property to a third person. It cannot be sold in his hands under a judgment against his vendor.[281] In some of the states, a different view of the homestead law has been sustained. Under this view, the homestead exemption is a mere personal right of the claimant, by virtue of which the property is for the time being withdrawn from forced sale. The lien of a judgment is deemed to attach to the property notwithstanding this right, and to remain in abeyance only so long as the right continues capable of assertion by the defendant. Hence, when the defendant sells the property, and thereby parts with his right to insist upon its exemption, it at once becomes liable to sale under a judgment lien existing against him.[282] In two of the states[283] where this view was sustained by the courts, the legislature, aware of the inconveniences likely to result from its maintenance, enacted statutes under

[281] Holland v. Kreider, 86 Mo. 59; Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516; Bowman v. Norton, 16 Cal. 214; Marriner v. Smith, 27 Cal. 649; Deffeliz v. Pico, 46 Cal. 289; Englebrecht v. Shade, 47 Cal. 627; Green v. Marks, 25 Ill. 204; Hume v. Gossett, 43 Ill. 297; Bonnell v. Smith, 53 Ill. 377; Coe v. Smith, 47 Ill. 225; McDonald v. Crandall, 43 Ill. 231; Lamb v. Shays, 14 Iowa, 567; Parker v. Dean, 45 Miss. 409; Bliss v. Clark, 39 Ill. 590, 89 Am. Dec. 330; Fishback v. Lane, 36 Ill. 437.

[282] Hoyt v. Howe, 3 Wis. 753, 62 Am. Dec. 705; Whitworth v. Lyons, 39 Miss. 467; Allen v. Cook, 26 Barb. 374; Smith v. Brackett, 36 Barb. 571; Folsom v. Carli, 5 Minn. 333, 80 Am. Dec. 429; Trustees v. Schell, 17 Wis. 308; Tillotson v. Millard, 7 Minn. 513, 82 Am. Dec. 112.

[283] The states referred to are Minnesota and Wisconsin. Seamans v. Carter, 15 Wis. 548, 82 Am. Dec. 696; Dopp v. Albee, 17 Wis. 590.

Digitized by Google

which homesteads are not liable to judgment liens, and may, therefore, as in other states, be sold or encumbered by the owner, irrespective of liens existing against him arising from judgments rendered after the premises became his homestead. Except in the states of Ohio, Louisiana, Texas, Alabama, and Mississippi,[284] the establishment of a homestead can in no wise impair any judgment lien previously existing. In such a case, while the property may be dedicated as a homestead, the right of the claimant must always exist in subservience to the anterior lien.[285] Whether a homestead is subject to a judgment lien existing before its use or dedication as such is, of course, dependent upon the language of the statute creating the exemption and specifying the claims against which it may be asserted. Certainly, unless the statute so declares, the lien does not, prior to the levy of the execution, constitute any impediment against the acquirement and assertion of the homestead right, especially where the property was acquired for homestead purposes and the claimant is

[284] Wildemuth v. Koenig, 41 Ohio St. 180; Jones v. Hart, 62 Miss. 13; Faqua v. Chaffe, 26 La. Ann. 148; Stone v. Darnell, 20 Tex. 11; McManus v. Campbell, 37 Tex. 267; Trotter v. Dobbs, 38 Miss. 198, holding that property is exempt if it is a homestead at the date of the sale. The homestead cannot defeat prior mortgages. Rix v. McHenry, 7 Cal. 89; Roupe v. Carradine, 20 La. Ann. 244; Ely v. Eastwood, 26 Ill. 107; Smith v. Marc, 26 Ill. 150. Nor trust deeds. Chipman v. McKinney, 41 Tex. 76.

[285] Liebetrau v. Goodsell, 26 Minn. 417; Elston v. Robinson, 23 Iowa, 208; McCormick v. Wilcox, 25 Ill. 274; Howard v. Wilbur, 5 Allen, 219; Tuttle v. Howe, 14 Minn. 145, 100 Am. Dec. 205; Hale v. Heaslip, 16 Iowa, 457; McKeithan v. Terry, 64 N. C. 25; Seamans v. Carter, 15 Wis. 548, 82 Am. Dec. 696; Sluder v. Rogers, 64 N. C. 280; Dopp v. Albee, 17 Wis. 590; Trustees v. Schell, 17 Wis. 308; Fitzell v. Leaky, 72 Cal. 477; Dumbould v. Rowley, 113 Ind. 353; Beyer v. Thoeming, 81 Iowa, 517; Butler v. Nelson, 72 Iowa, 732; Grimes v. Portman, 99 Mo. 229; Ketchin v. McCarley, 26 S. C. 1, 4 Am. St. Rep. 674; Stanley v. Sullivan, 71 Wis. 585, 5 Am. St. Rep. 245.

Digitized by Google

proceeding in good faith to fit and occupy it for such purposes, though the judgment lien antedates the use and occupancy.[286]

In some of the states the premises occupied as a homestead may all be embraced in the declaration or claim of homestead, though their value is far in excess of the amount which the statute permits to be retained as exempt. In the event of this levy of an execution on such premises, certain proceedings designated in the statute may be taken for the purpose of setting aside to the debtor the amount to which he is entitled, and subjecting the balance to execution. In such a case, what is the effect of judgment liens? Do they attach so as to entitle their holders to claim the proceeds of the homestead in excess of the amount which the debtor may retain? It has been said that in such circumstances "there is no lien of the judgment until the levy of an execution."[287] From this conclusion we dissent. A judgment lien attaches to all the real property of the defendant not exempt from execution. That part of the property claimed as a homestead in excess of the amount which the debtor may retain as exempt, is at all times subject to execution and to forced sale, and there is therefore no reason why creditors may not,

[286] Weare v. Johnson, 20 Colo. 363; Woodward v. People's N. B., 2 Colo. App. 369; Emporia etc. Assn. v. Watson, 45 Kan. 132; Deville v. Widoe, 64 Mich. 593, 8 Am. St. Rep. 852; Letchford v. Cary, 52 Miss. 791; Wildermuth v. Koenig, 41 Ohio St. 180; Warren v. Darnell, 20 Tex. 11; Cameron v. Gebhard, 85 Tex. 610, 34 Am. St. Rep. 832; McMillan v. Mau, 1 Wash. 26.

[287] Barrett v. Sims, 59 Cal. 619; Lubbock v. McMann, 82 Cal. 226, 16 Am. St. Rep. 108; Sanders v. Russell, 86 Cal. 120, 21 Am. St. Rep. 27; Macke v. Byrd, 131 Mo. 682, 52 Am. St. Rep. 649; Fairbanks v. Devereaux, 48 Vt. 552.

Digitized by Google

with respect thereto, obtain the benefits both of judgment and attachment liens.[288]

§ 249e. Attachment Liens against Homesteads.—Whether the dedication of a homestead can impair a pre-existing attachment lien is a question upon which the courts are divided. In California and Nevada, the lien of the attachment may be destroyed by the subsequent dedication of the premises as a homestead at any time before the judgment is docketed, so as to become a lien.[289] These decisions are founded upon a consideration of the homestead statutes of those states, leaving out of view the provisions of the code respecting attachments. It is true that the Civil Code of California, in enumerating the judgments under which the homestead may be sold, does not specify any judgments except those "obtained before the declaration of homestead was filed for record, and which constitute liens on the premises."[290] But the Code of Civil Procedure declares that plaintiff "may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered."[291] Such attachment is directed to be of all property of "defendant within the county, not exempt from execution."[292] "If judgment be recovered by the plaintiff, the sheriff must

[288] Moriarty v. Galt, 112 Ill. 378; Eldridge v. Pierce, 90 Ill. 474; Hardy v. Sulzbacher, 62 Ala. 44; Watson v. Doyle, 130 Ill. 415; Louden v. Yager, 91 Ky. 57; Tingley v. Gregory, 30 Neb. 196; Vanstory v. Thornton, 112 N. C. 196, 34 Am. St. Rep. 483; Strayer v. Long, 93 Va. 695.

[289] Wilson v. Madison, 58 Cal. 1; McCracken v. Harris, 54 Cal. 81; Sullivan v. Hendrickson, 54 Cal. 258; Hawthorne v. Smith, 8 Nev. 182, 93 Am. Dec. 397.

[290] Civ. Code Cal., sec. 1241.

[291] Code Civ. Proc. Cal., sec. 537.

[292] Code Civ. Proc. Cal., sec. 540.

Digitized by Google

satisfy the same out of the property attached."[293] These provisions clearly make it the duty of the officer to levy the writ on all property not then exempt from execution, and afterward, in the event of plaintiff's recovering judgment, to sell all the property attached, if necessary to produce a satisfaction of such judgment. We think, therefore, that, construing all the statutes together, it clearly appears that these decisions are wrong, and that when an attachment is properly levied on lands not then exempt from attachment and execution, a lien is created which no subsequently arising exemption can supplant; and in so thinking we are sustained by a decided preponderance of the adjudications upon this subject.[294] The property dedicated as a homestead may be of greater value than the amount allowed for a homestead exemption. In this event the statute points out the mode of proceeding to subject the excess to execution, and the mode so designated seems to exclude every other.[295] Though the point seems never to have been decided, we apprehend that an attachment levied on a homestead would initiate a lien and give the attaching creditor precedence with respect to that part of the homestead in excess of the amount allowed by law.

§ 249 f. Vendors' Liens against Homesteads.—We believe the rule prevails everywhere, without exception, that the right of the holder of exempt property, whether real or personal, to claim the benefit of exemption, always exists in subordination to the right of his vendor

[293] Code Civ. Proc. Cal., sec. 550.

[294] Avery v. Stephens, 48 Mich. 246; Watkins v. Overby, 83 N. C. 165; Kelley v. Dill, 23 Minn. 435; Robinson v. Wilson, 15 Kan. 595; Bullene v. Hiatt, 12 Kan. 98.

[295] Barrett v. Sims, 59 Cal. 615, 62 Cal. 440.

Digitized by Google

to enforce the payment of any sum remaining due for the purchase price. The rule that a homestead may be sold to enforce the payment of a vendor's lien is undoubted.[296] The limits within which this rule must be confined are disputed. Strictly speaking, a vendor's lien must be regarded as a lien existing for the purpose of securing the debt due from a vendee to a vendor. But there are many instances in which a person other than the vendor has been so connected with the purchase of homestead property that, according to equity and good conscience, he ought to be subrogated to the lien of the vendor. These instances arise whenever any one pays the purchase price, or some valid existing security therefor, for the benefit and at the instance of the occupants of the homestead. But many of the decisions show a tendency to disregard the strong equities of these persons, and to deny them that relief which would be extended to vendors. Whenever these decisions prevail, a third person furnishing money with which to buy a homestead for another, or to relieve another's homestead from a vendor's or other paramount lien, is without any redress against the homestead.

[296] Stone v. Darnell, 20 Tex. 12; Barnes v. Gay, 7 Iowa, 26; Montgomery v. Tutt, 11 Cal. 191; Phelps v. Conover, 25 Ill. 309; Buckingham v. Nelson, 42 Miss. 417; Williams v. Young, 17 Cal. 403; Succession of Foulkes, 12 La. Ann. 537; McHendry v. Reilly, 13 Cal. 75; Perrin v. Sargeant, 33 Vt. 84; Woolfolk v. Rickets, 41 Tex. 358; Hopper v. Parkinson, 5 Nev. 233; Tunstall v. Jones, 25 Ark. 272; Cole v. Gill, 14 Iowa, 527; Andrews v. Alcorn, 13 Kan. 351; Joplin v. Fleming, 38 Tex. 526; Miller v. Marckle, 27 Ill. 405; New E. Co. v. Merriam, 2 Allen, 390; Ulrich's Appeal, 48 Pa. St. 489; Fehley v. Barr, 66 Pa. St. 196; Stevens v. Stevens, 10 Allen, 146, 87 Am. Dec. 630; McCreery v. Fortson, 35 Tex. 641; Burford v. Rosenfield, 37 Tex. 42; Chambliss v. Phelps, 39 Ga. 386; Christy v. Dyer, 14 Iowa, 488, 81 Am. Dec. 493; Toms v. Fite, 93 N. C. 274; White v. Simpson, 107 Ala. 386; Brightman v. Fry, 17 Tex. Civ. App. 531.

Digitized by Google

He must seek satisfaction out of other property.[297] In some of the states, a more just rule prevails—one under which a person paying the purchase-money at the instance of the homestead claimant may enforce its repayment by proceeding against the homestead premises.[298] Under these decisions the form or mode of paying the purchase money seems immaterial. The question is, whether the party seeking to subject the homestead to his debt has in effect discharged the obligation of the homestead claimant to first pay for the premises before holding them as exempt. Hence, the following persons have been adjudged to be entitled to enforce their claim against the household: a vendor who had received in payment notes of a third person indorsed to him by the vendee and claimant;[299] one who advances money to pay for the homestead, or to discharge a valid lien thereon,[300] except when the moneys were advanced on the mere personal security of the vendee, and without any reference to the use which he was to make of them. A person in possession of prop-

[297] Winslow v. Noble, 101 Ill. 194; Burnap v. Cook, 16 Iowa, 149; Lear v. Heffner, 28 La. Ann. 829; Malone v. Kaufman, 38 Tex. 454; Wynn v. Flannegan, 25 Tex. 778; Skaggs v. Nelson, 25 Miss. 88; Nottes' Appeal, 45 Pa. St. 361; Stansell v. Roberts, 13 Ohio, 148; Bugg v. Russell, 75 Ga. 837; Dreese v. Myers, 52 Kan. 129, 39 Am. St. Rep. 336; Bradley v. Curtis, 79 Ky. 327; Pridgen v. Warn, 79 Tex. 588; Loftus v. Loftus, 94 Tenn. 232; Washmund v. Merritt, 60 Tex. 24; Hicks v. Morris, 57 Tex. 658, overruling Malone v. Kaufman, 38 Tex. 454; Carey v. Boyle, 53 Wis. 574.

[298] Carr v. Caldwell, 10 Cal. 384, 70 Cal. 740; Pratt v. Topeka Bank, 12 Kan. 570; Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254; Magee v. Magee, 51 Ill. 500, 99 Am. Dec. 571. See Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Kelly v. Stephens, 39 Ga. 466; Griffin v. Treutlen, 48 Ga. 148; Allen v. Hawley, 66 Ill. 170.

[299] Whitaker v. Elliott, 73 N. C. 186; Lane v. Collier, 46 Ga. 580.

[300] Lassen v. Vance, 8 Cal. 271, 68 Am. Dec. 322; Nichols v. Overacker, 16 Kan. 54; Hamrick v. People's Bank, 54 Ga. 502; Griffin v. Treutlen, 48 Ga. 148.

Digitized by Google

erty claimed as a homestead may purchase a title thereto different from that under which he has before held. A vendor's lien for money agreed to be paid for this title may be enforced. The wife may, however, defeat its enforcement, by showing that the new title was not paramount to that under which the property was held before its acquisition.[301]

The questions relating to vendor's lien, or the right of the plaintiff to be subrogated to a vendor's lien, need not concern the officer in the execution of the writ. If the judgment is a simple money judgment, containing no directions showing on what property it may be levied, the homestead is exempt, unless the judgment is secured by a pre-existing attachment, the continued effect of which is conceded by the laws of the state. If the plaintiff claims a lien he can only enforce it by some appropriate proceeding in equity, resulting in a decree recognizing the lien, and directing it to be satisfied by the sale of specified property. An order of sale pursuant to such a decree will justify the officer in selling the property therein described, and will preclude the defendant from disputing the validity of such sale. But in the absence of such a decree, the officer cannot take into consideration the question whether indebtedness out of which the judgment arose was in any way connected with the purchase price of the property claimed as a homestead.[302] The decree under which the officer acts may purport to direct a sale of the homestead premises; but the effect of the sale, when made, may be doubtful, because of the failure to make

[301] Cassel v. Ross, 33 Ill. 244, 85 Am. Dec. 270.

[302] Tunstall v. Jones, 25 Ark. 272; Pinchain v. Collard, 13 Tex. 333; Williams v. Young, 17 Cal. 403. Contra, Durham v. Bostick, 72 N. C. 357.

Digitized by Google

the wife a party to the suit, and thereby obtain in advance of the sale an adjudication upon her interests. This happens when a mortgage, executed by her husband, in which she did not join, is foreclosed against him alone. Such a mortgage may be enforced when given for the purchase money. But what will be the effect of a decree for its enforcement to which the wife is not a party? In some instances a sale thereunder has been held to entitle the purchaser to possession of the property sold, as against the wife, upon proof that the mortgage was given for the purchase money.[303] If the wife, under the statutes of the estate, has any estate or interest in the homestead, we very much doubt the efficiency of a sale under a judgment to which she was not a party, to divest her interest or to entitle the purchaser to dispossess her of her home.

§ 249 g. Mechanics' Liens against the Homestead.— Almost universally the statutes in relation to homesteads do not exempt them from sale under judgments foreclosing mechanics' liens.[304] This question is not germane to the subject of this work, unless it may be claimed that one who has furnished labor upon a homestead, and who, because of this, becomes entitled to a lien, may recover a judgment in personam, without relying on his lien, or after his right to assert his lien has terminated, and thereupon become entitled to levy his

[303] Skinner v. Beatty, 16 Cal. 156; Amphlett v. Hibbard, 29 Mich. 298.

[304] Allen v. Harley, 3 S. C. 412; Merchant v. Perez, 11 Tex. 20; Stevenson v. Marony, 29 Ill. 534; Hawthorne v. Smith, 3 Nev. 186, 93 Am. Dec. 397; Stone v. Darnell, 20 Tex. 14; Thompson on Homesteads and Exemptions, secs. 372, 373; Tuttle v. Howe, 14 Minn. 145; McAnally v. Hawkins L. Co., 109 Ala. 397; Anderson v. Seamans, 49 Ark. 475; Dicken v. Thrasher, 58 Ga. 360; Butler v. Davis (Ky.), 23 S. W. 220; Bonner v. Minnier, 13 Mont. 269, 40 Am. St. Rep. 441; Phelps v. Shay, 32 Neb. 19.

Digitized by Google

execution upon such homestead. There are, indeed, decisions to support this view.[305] It is, however, not defensible. If one wishes to enforce a mechanics' lien against a homestead, he must do so by some suit in equity wherein he can obtain a decree directing a sale of the specific property which is subject to the lien. Otherwise the sheriff cannot justify a levy on a homestead on the ground that the debt merged in the judgment was for a claim upon which the claimant might have been entitled to perfect and enforce a mechanics' or laborers' lien.[306]

When the inception of such a lien antedates the dedication of the premises as a homestead, there can be no doubt of the propriety of this rule, both because it is inequitable for the claimants to receive, without compensation, labor and materials, and use them in constructing improvements to be held as exempt, and because a homestead claim or declaration is generally subordinate to all pre-existing liens.[307] But if the homestead precedes the inception of the mechanics' lien, and the statute of the state forbids the encumbering or abandoning of the homestead without the assent of the wife, there is grave doubt of the right to assert a mechanic's lien against the homestead, unless it is based upon some contract to which the wife has given her assent in the mode in which she is permitted to encumber her homestead. The statutes of Texas expressly require such a contract to create a mechanics' or materialman's lien enforceable against homestead

[305] Tyler v. Johnson, 47 Kan. 410; Miller v. Brown, 11 Lea, 155.

[306] McPhee v. O'Rourke, 10 Colo. 301, 3 Am. St. Rep. 579; Sternberger v. Gowdy, 93 Ky. 146; Merchant v. Perez, 11 Tex. 20.

[307] McMonegal v. Wilson, 103 Mich. 264.

Digitized by Google

property.[308] Where the language of a statute is such as to justify the creation and enforcement of a mechanic's lien, it appears, in the majority of the states, to have been strictly construed. If the statute denies the exemption, as against the liens of mechanics and laborers, this will not permit the enforcement against the homestead of the lien of one who furnishes materials which are used in erecting improvements thereon.[309] This rule is denied in some of the states, the courts of which have determined that a materialman was within the spirit of the statute, and hence entitled to a lien under circumstances which would have entitled a mechanic thereto, had he performed the services.[310]

§ 249 h. Miscellaneous Debts against Which Homesteads are not Exempt.—In Georgia, the homestead exemption is subordinate to the lien allowed by statute to "factors, merchants, landlords, dealers in fertilizers, and all other persons furnishing supplies, money, farming utensils, or other articles necessary to make crops."[311] In New Hampshire, under a statute providing that the homestead exemption shall not extend to "any claim for labor less than one hundred dollars," it was held that this exception "would not ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad, and other contractors,

[308] Sutherland v. Williams (Tex.), 11 S. W. 1067; Cameron v. Gebhard, 85 Tex. 610, 34 Am. St. Rep. 832.

[309] Richards v. Shear, 70 Cal. 187; Walsh v. McMenomy, 74 Cal. 356; Coleman v. Ballandi, 22 Minn. 144; Smith v. Lackor, 23 Minn. 454.

[310] Bonner v. Minnier, 13 Mont. 269, 40 Am. St. Rep. 441; Phelps v. Shay, 32 Neb. 19.

[311] Tift v. Newsom, 44 Ga. 600; Davis v. Meyers, 41 Ga. 95.

Digitized by Google

but would be confined to claims arising out of services where physical toil was the main ingredient, although directed and made more valuable by mechanical skill."[312] In Minnesota, the portion of the homestead act "which excepts, from the exemption provided, debts or liabilities for wages due to clerks, laborers, or mechanics," was held to be void, because in direct conflict with the bill of rights of that state.[313]

Where a person entitled to a homestead exemption owns only an undivided interest in the property, he must submit to a partition at the instance of his cotenants, the same as if no homestead claim were made. If it appears that the partition cannot be effected by metes and bounds, a sale may be ordered as in other cases. The provisions of the statute of the state forbidding a forced sale of a homestead are not applicable to proceedings in partition. Otherwise, the existence of a homestead in favor of one cotenant might preclude the others from having any partition,[314] but it has been held that the costs of the partition cannot be made a charge upon the interest of the cotenant entitled to the homestead exemption, nor deducted, without his consent, from his share of the proceeds of the sale.[315]

§ 250. By the Homestead Act of the United States, the provision is made that "no lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."[316]

[312] Weymouth v. Sanborn, 43 N. H. 171, 80 Am. Dec. 144.
[313] Tuttle v. Strout, 7 Minn. 465, 82 Am. Dec. 108.
[314] Kirkwood v. Domnau, 80 Tex. 645, 26 Am. St. Rep. 770.
[315] Kirkwood v. Domnau, 80 Tex. 645, 26 Am. St. Rep. 770.
[316] Smith v. Steele, 13 Neb. 1; Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836.

Digitized by Google

This statute is constitutional. The right of Congress to enact it is sustained on the ground that it is given power to dispose of the public lands of the United States, and to make all needful rules and regulations in regard thereto.[317] Property acquired under this act is exempt from execution for a debt created before the issuing of the patent, but afterward reduced to a judgment against the patentee. As they are not subject to sale under execution, it is not possible for the judgment to create any lien on the lands acquired under the act. Hence, the patentee may, notwithstanding such judgment, transfer the lands, and a sale under the judgment will not affect the title of the vendee of the patentee.[318] Under this act, the homestead claimant may, before the expiration of the five years he is required to reside on the lands, obtain a patent by making payment to the government. In this event, his title, though having its inception under the homestead act, is consummated by the payment of money instead of by continuous residence for the period prescribed by the act. The supreme court of Oregon has, nevertheless, decided that the patent, though procured by payment, is not the less obtained and issued under the homestead act, and that it vests a title in the patentee which cannot be made to contribute to the payment of his pre-existing debts.[319]

If a homestead claimant has fully performed all the conditions to be performed on his part to entitle him to a patent, so that the United States may be regarded as holding the legal title in trust for him without any

[317] Callsen v. Hope, 3 Kan. App. 694; Wallowa N. B. v. Riley, 29 Or. 289, 54 Am. St. Rep. 794.

[318] Miller v. Little, 47 Cal. 348; Dickerson v. Culburth, 55 Mo. App. 647.

[319] Clark v. Bayley, 2 Cent. L. J. 299.

Digitized by Google

right to further withhold it or to exact any other condition, it has been held that the interest of the claimant is subject to execution.[320] The national courts have not determined this question, but it is believed that the language of the statute is too clear to admit of doubt, and that execution can be levied only after a patent has issued, and not then, unless for a debt contracted before such issuing.[321]

§ 250a. The Excess in Area or Value of Property Claimed as a Homestead is not exempt from forced sale for the payment of the claimant's debts. It is true that it is not in all the states subject to execution. Thus, in New York the only proceeding by which it can be reached and applied to the payment of debts is by a creditors' suit brought after the return of an execution unsatisfied.[322] On the other hand, it is possible, in a few states, to proceed to levy upon and sell a homestead under execution and to thereby convey to the purchaser any excess of the property over and above what is exempt, leaving that excess to be determined in some subsequent controversy between the purchaser and the claimant.[323] In the vast majority of the states there can be no valid execution sale of lands, any part of which is exempt from execution as a homestead, and such sale, whether the claimant has interposed any demand for exemption or not, is void as against him, and does not convey any title whatsoever, though it is true that proper proceedings would have shown that some part of the property so sold was subject to exe-

[320] Struby etc. Co. v. Davis, 18 Colo. 93, 36 Am. St. Rep. 266.

[321] Barnard v. Boller, 105 Cal. 214; Wallowa N. B. v. Riley, 29 Or. 289, 54 Am. St. Rep. 794.

[322] N. Y. C. C. P., § 1402.

[323] Snider v. Martin, 55 Ark. 139; Martin v. Bowie, 37 S. C. 102.

Digitized by Google

cution. Where the mode is designated by statute of segregating the exempt from the unexempt part, a sale in advance of any resort thereto is void, or, at all events, not enforceable against the homestead claimants.[324]

When it is sought to subject to execution lands which are or may be claimed as a homestead, the first step is to levy the writ thereon, and this, in the absence of any statutory direction to the contrary, should be done in the same manner as upon other real property. In South Carolina, however, a levy need not precede the application for the allotment of a homestead.[325] If the defendant has not made any declaration of homestead, or any other selection authorized by law and appearing on the public records, he is, in some of the states, required, upon receiving notice of such levy, to make some designation or selection, especially if the lands occupied by him as a homestead exceed in quantity or value the statutory exemption. It is, therefore, always the duty of the officer levying the writ, where the defendant is entitled to make any selection, to notify him of the levy, and afford him an opportunity to act for the protection of his interest.[326] Generally, however, the debtor may remain passive and impose on the creditor the burden of taking such proceedings as the statute requires to enable him to reach such part of the homestead as may be subject to execution.

[324] Ante, § 239; Barrett v. Sims, 59 Cal. 615; Hartwell v. McDonald, 69 Ill. 293; Barrett v. Wilson, 102 Ill. 302; Nichols v. Spremont, 111 Ill. 631; Bullen v. Dawson, 139 Ill. 633; White v. Rowley, 46 Iowa, 680; Lowell v. Shannon, 60 Iowa, 713; Owens v. Hart, 62 Iowa, 620; Visek v. Doolittle, 69 Ill. 602; Ferguson v. Kumler, 25 Minn. 183; Kipp v. Bullard, 30 Minn. 84.

[325] Nance v. Hill, 26 S. C. 227.

[326] Shacklett v. Scott, 23 Mo. App. 322.

Digitized by Google

The statutes of some of the states are quite imperfect and indefinite respecting proceedings to be taken for the purpose of subjecting a homestead excess to execution. In the vast majority of them, however, such is not the case, and while the proceedings authorized differ somewhat in their details, they all pursue substantially the same course. The property claimed may be alleged to exceed the amount allowed as exempt, either in quantity or value, or both. In either event, the first object of the statute is to provide for some means by which to ascertain whether there is any excess, and the second, if such excess is found to exist, is to provide for separating it from the homestead, so that it may be subjected to execution, and the homestead rights of the claimant still be respected. Persons are therefore selected to inquire whether the property claimed exceeds that allotted, and if they find that it does, to allot to the defendant what he is entitled to retain as his homestead, if such allotment can be made without unduly sacrificing the rights of the parties. If the appraisers find that it cannot be so allotted, they so report. If an allotment is made, the part set aside as not constituting any part of the homestead may be sold under execution. If the report is that no division of the property can be made, then the whole is subject to sale, provided there shall be some bid therefor exceeding the amount of the statutory exemption. The defendant is given such amount, and the balance is applied on the execution. In some of the states he may prevent a sale by paying his creditor the difference between the amount of his exemption and the value of the whole property as fixed by the ap-

Digitized by Google

praisers.[327] The officers appointed to make the estimate and allotment are called appraisers, surveyors, commissioners, jurors, freeholders, etc. Sometimes they are appointed by the officer levying the writ, sometimes by the court, and sometimes the claimant and the creditor both have a share in the appointment.[328]

In Ohio, if a homestead exceeds the statutory value and is not capable of division, the appraisers must estimate the annual rental value thereof, and the debtor may retain the whole on paying his creditors the difference between the rents so estimated and one hundred dollars per annum.[329] Perhaps a creditor may, in Texas, in addition to the statutory remedy, maintain a suit in equity for the sale of the premises and the awarding to him of such part of the proceeds as may be regarded as in excess of the claimant's rights.[330] The statutes generally provide for notice to the parties interested of the proceedings of the appraisers, and we apprehend that, even in the absence of specific statutory provision, the allotment of a homestead must be deemed a judicial or quasi-judicial proceeding, to the

[327] Starr & Curtis' An. St. Ill., 1896, p. 1886, § 11; Loomis v. Gerson, 62 Ill. 11; Howell's St. Mich., §§ 7728, 7729; Thompson, Dillard & Campbell's Code Miss., § 1977; Gen. St. S. C., ed. 1882, § 1994.

[328] Code Ala., §§ 2534, 2535; Sandel & Hill's St. Ark., 1894, §§ 3714, 3721 to 3723; Brown v. Peters, 3 Ark. 182; Snider v. Martin, 5 Ark. 139; Civil Code Cal., §§ 1245-1256; Starr & Curtis' Ann. St. Ill., ed. 1896, p. 1885, § 10, and p. 1886, § 12; Muller v. Inderreiden, 79 Ill. 382; Code Ia., ed. 1897, §§ 2980, 2983; Howell's St. Mich. §§ 7723-7725, 7728, 7729; St. Minn., ed. 1894, §§ 5523-5525; Thompson, Dillard & Campbell's Code Miss. §§ 1976, 1977; Rhyne v. Guevra, 67 Miss. 139; Rev. St. Mo., 1889, §§ 5436, 5440, 5444; Welch v. Welch, 101 N. C. 565; Glauque's Rev. St. Oh., § 5438; Gen. St. S. C., ed. 1882, § 1994; Simons v. Hitchcock, 26 S. C. 595; Bradford v. Buchanan, 39 S. C. 237.

[329] Glauque's Rev. St. Oh., § 5439.

[330] Paschal v. Cushman, 26 Tex. 74; Mackey v. Wallace, 26 Tex. 526.

Digitized by Google

validity of which notice to the parties and an opportunity on their part to be heard must be essential.[331]

If the law creating an exemption provides a limit in value, but does not authorize any proceeding to reach the excess, if one exists, two opposing theories have been advanced by the courts, one, that if the homestead cannot be segregated so as to reduce its value to the statutory amount, the whole is subject to execution,[332] and the other, that the whole must remain exempt until the legislature authorizes a sale and the payment to the creditor of the amount in excess of the exemption.[333]

The estate or interest of the defendant in the property may be less than the fee simple, as where it is an estate for years, or for the life of another, and though the estate is in fee simple, it may be subject to liens enforceable against the homestead. In either event the question arises, to what extent must the debtor's title be considered. In the first contingency, the nature of his title cannot be taken into consideration. The amount and value of the land to which he is entitled as a homestead must be estimated as though he were the owner in fee. He is not entitled to any greater quantity either in area or value because of the temporary character of his estate.[334] If, however, the property is subject to incumbrances, they will generally be regarded as affecting primarily the interest which is subject to execution. If an allotment is made, the claimant will be entitled to have the part allotted

[331] Miller v. Schnelby, 103 Mo. 368.

[332] Farley v. Whitehead, 63 Ala. 295; Miller v. Marx, 55 Ala. 322; Watts v. Burnett, 56 Ala. 340; Heffenstein v. Cave, 3 Ia. 287.

[333] Beecher v. Baldy, 7 Mich. 488; Campbell v. White, 95 N. C. 491; Oakley v. Van Noppen, 96 N. C. 247.

[334] Brown v. Starr, 79 Cal. 608, 12 Am. St. Rep. 180.

Digitized by Google

to his creditor first subject to the payment of the liens, and, if a sale is directed, the excess above the homestead value should first be applied to the satisfaction of the incumbrances,[335] and it has even been held that, for the purpose of determining whether the claimant's homestead exceeds the statutory value, there may be deducted from its market or appraised value the amount of the incumbrances against it.[336]

The appraisement or allotment made in proceedings to subject the homestead to execution is binding on all the parties thereto, unless assailed or vacated in due time in the court wherein the proceedings took place. Neither the creditor nor the debtor can, by any collateral attack, avoid such allotment or appraisement or the sales made under execution by virtue thereof.[337] Ordinarily, these proceedings cannot affect persons not parties thereto, and hence another judgment creditor is not bound by them,[338] unless, perhaps, where the statute clearly gives them the character of proceedings in rem.[339]

An allotment or appraisement may be conceded to have been correct when made, and yet a judgment creditor may, at a subsequent date, correctly insist that

[335] Des Moines N. B. v. Harding, 86 Ia. 153; Corey v. Plummer, 48 Neb. 481; Vermont S. B. v. Elliott, 53 Mich. 256; Prugh v. Portsmouth S. B., 48 Neb. 414; Mundt v. Hagedorn, 49 Neb. 409; Hill v. Parker, 29 Pa. St. 362; Quinn's Appeal, 86 Pa. St. 447; Clancy v. Alme, 98 Wis. 229, 67 Am. St. Rep. 802; Rozek v. Redzinski, 87 Wis. 525.

[336] Lozo v. Sutherland, 38 Mich. 168; Hay v. Anderson, 39 Neb. 386, 42 Am. St. Rep. 607.

[337] Lallement v. Detert, 96 Mo. 182; Meyer v. Nickerson, 101 Mo. 184; Gully v. Cole, 96 N. C. 447; Welch v. Welch, 101 N. C. 585; Simonds v. Haithcock, 24 S. C. 207.

[338] Louden v. Yager, 91 Ky. 57.

[339] Hardy v. Lane, 6 Lea, 380.

Digitized by Google

some part of the premises is subject to execution, because their value has been enhanced by additional improvements erected thereon, or by some other cause. Whether a judgment creditor, at whose instance the first allotment was made, may afterward obtain another on the suggestion of an increase in the meantime of the value of the property we know not, but other judgment creditors are not bound by the former allotment, and may hence proceed as if it had never been made, to obtain a reappraisement or allotment under their respective writs.[340]

[340] Stubblefield v. Graves, 50 Ill. 103; Haworth v. Travis, 67 Ill. 301; Mooney v. Moriarity, 36 Ill. App. 175; Beckner v. Rule, 91 Mo. 62; Macke v. Byrd, 131 Mo. 682, 52 Am. St. Rep. 649.

Digitized by Google

CHAPTER XVI.

OF LEVIES UPON PERSONAL PROPERTY.

§ 250b. The person by whom a levy may be made.
§ 251. Writs must be levied according to their priority.
§ 252. Of the diligence which officers must exercise.
§ 253. Of the amount of property to be taken.
§ 254. Whose property may be taken, and of the right to indemnity.
§ 254a. Levy upon property of which defendant is not an owner in severalty.
§ 255. Of the right to take property from defendant's person.
§ 256. Of the right to enter on the premises of the defendant or another to make a levy.
§ 257. Demand preceding levy.
§ 258. Defendant's right of selection of property to be levied.
§ 259. Surety's right to require the levy to be made on property of his principal.
§ 260. Of the acts essential to make and maintain a valid levy of execution.
§ 261. Leaving defendant in possession after a levy.
§ 262. Of the acts essential to make and maintain a valid levy of attachment.
§ 262a. Of property not capable of manual delivery.
§ 263. Of levies on ponderous and immovable property.
§ 264. Of restoring possession to defendant on his executing a "forthcoming" or "delivery" bond.
§ 265. Of leaving property in the custody of a receiptor.
§ 266. The inventory is proper, but not indispensable.
§ 267. Levy under a second writ.
§ 268. The effect of a levy on the title to the property.
§ 269. The effect of a levy as a satisfaction of the writ.
§ 269a. Levy accomplished by fraud or unlawful act.
§ 270. Of the degree of care exacted in keeping the property.
§ 271. Releasing and vacating levies.
§ 271a. Release of levy otherwise than by act or default of plaintiff.
§ 271b. Result of release of levy.
§ 272. Liability of officers for wrongful levies.
§ 273. Liability of plaintiffs and others for wrongful levies.
§ 274. Is a levy indispensable to a valid sale?

Digitized by Google

§ 250 b. The Person by Whom a Levy May be Made sufficiently appears from considering a previous section respecting the competency of officers to act under and by virtue of writs of execution.[1] In the first place, the levy must be made by an officer; it cannot be made by a private citizen,[2] and the officer must be qualified to act under the writ. Otherwise, his acts have no greater effect than if done by one having no official capacity. If the writ is directed to a particular officer or class of officers, the officer undertaking to act under it must be the officer or one of the class of officers to whom it is thus directed.[3] He must not act outside of the county or district by which his authority is limited,[4] and he must not be subject to any special disqualification, such as interest in the writ, or forbidden relationship to the parties.[5]

§ 251. The Writ First Delivered must be First Levied. Before the officer succeeds in making the levy, several writs against the defendant may come into his hands. Under such circumstances, it is the duty of the officer to preserve the priority of the respective writs, and to give preference to that which has the oldest lien. In those states where executions are liens from the date of their teste, or from the moment of their delivery to the officer for service, the levy of a junior before that

[1] Ante, § 99a.

[2] McMillan v. Rowe, 15 Neb. 520.

[3] Satterwhite v. Melczer (Ariz. 1890), 24 Pac. 184; Porter v. Stapp, 6 Colo. 32; Menderson v. Specker, 79 Ky. 509; Johnson v. Elkins, 90 Ky. 163; Levy v. Acklen, 37 La. An. 545; Steel v. Metcalf, 4 Tex. Civ. App. 313.

[4] Oldfield v. Eulert, 148 Ill. 614, 39 Am. St. Rep. 231; Needles v. Frost, 2 Okla. 19.

[5] Ante, § 99a; Erwin v. Bowman, 51 Tex. 513; Riner v. Stacy, 8 Humph. 288.

Digitized by Google

of a senior writ might not be of serious consequence, because the proceeds of the sale might, notwithstanding the levy of the junior writ, be distributed among the execution creditors in accordance with the rank of their respective writs.[6] In those states where the lien of an execution is dependent on its levy, the officer must always be careful to levy the writs in the order in which they have been placed in his hands, unless his duty in this respect is changed by directions from the parties having control of the writs.[7] This rule has been so inflexibly applied as to take away from the holder of the junior writ all incentive to diligence in discovering property subject to execution. For, notwithstanding the discovery, by the plaintiff in a junior writ, of property before unknown to the sheriff, it has been held that he cannot reward this superior diligence, but must first levy on the writ first received.[8] If, however, the officer levies the junior execution first, it obtains priority over other writs previously in his hands. When the lien of two or more writs is dependent upon levies made thereunder, the dates of their respective levies must be regarded irrespective of the dates of the writs, and of the times of their reception by the officer. The duty of the officer to levy the writs in the order of their reception is not equivalent to an ac-

[6] See § 196; McMahan v. Hall, 36 Tex. 59; Tabb v. Harris, 4 Bibb, 29, 7 Am. Dec. 732.

[7] Bragg v. State, 30 Ind. 427; Love v. Williams, 4 Fla. 126; Rust v. Pritchett, 5 Harr. (Del.) 260; Commonwealth v. Straton, 7 J. J. Marsh. 92; Heenan v. Evans, 4 Scott N. R. 2; 1 Dowl., N. S., 204; Walker v. Anderson, 31 Tex. 646; Arberry v. Noland, 2 J. J. Marsh. 422; Million v. Commonwealth, 1 B. Mon. 312, 36 Am. Dec. 580; Impey on Sheriffs, 117; Ohlson v. Pierce, 55 Wis. 205; May v. Buckhannon R. L. Co., 70 Md. 448; Albrecht v. Long, 25 Minn. 163; Hartman v. Campbell, 5 W. Va. 394.

[8] Knox v. Webster, 18 Wis. 406, 86 Am. Dec. 779.

Digitized by Google

tual levy in such order. He may, therefore, give precedence to a writ by levying it out of its order;[9] and by so doing he would doubtless become answerable to the holder of a prior writ for his neglect to levy it before levying under the subsequent writ. Precedence may in effect be given to a junior writ by the direction of the judgment debtor. Thus, every debtor has an unquestionable right to prefer one creditor to another; or, when making a payment to a creditor having two or more demands against him, to direct upon which of these demands it shall be credited. The delivery of executions to an officer does not impair this right. The debtor may, notwithstanding, make payments on any one of the writs; and a payment made by him upon a junior writ cannot be applied, contrary to his directions, toward the satisfaction of another, though senior writ.[10] Precedence may also be given to a junior writ by the creditor in whose favor the senior writ is issued by his directing an officer not to enforce it or to stay proceedings thereunder, or by any other direction showing that he does not intend it to be enforced with diligence.[11]

§ 252. Of the Diligence Which the Officer must Exercise in Making Levies.—The object of plaintiff in putting his writ in the hands of a sheriff or constable is, that property of the defendant may be seized and held to satisfy the exigencies of the writ. The duty of the officer, independent of all instructions, is to proceed to make this seizure. Whether or not he is obliged to make a return of the writ before the return day, there

[9] Johnson v. Gorham, 6 Cal. 195, 65 Am. Dec. 501; Million v. Commonwealth, 1 B. Mon. 310, 36 Am. Dec. 580.

[10] Rudy v. Commonwealth, 35 Pa. St. 166, 78 Am. Dec. 330.

[11] Ante, § 206; Wunsch v. McGraw, 4 Wash. 72.

Digitized by Google

is no doubt that it is effective from the moment he receives it, and the defendant has no right to insist on any postponement of the levy.[12] The officer has, therefore, a right to proceed at once, and a due regard to the plaintiff's interest seems to require immediate action. Of course, the officer may have other duties to perform, which are entitled to precedence. Unless required to postpone action for the purpose of attending to them, he should act at once.

If he fails to exercise reasonable care and energy in the performance of this duty, he is liable on his official bond for all damages which the plaintiff may suffer from such failure.[13] Unless the plaintiff interferes with the control of the writ, the officer has full authority to act, and is responsible both for misconduct and for inaction.[14] Whenever the sheriff seeks to justify his inaction by pleading that it was occasioned by the plaintiff, he assumes the affirmative, and must support it by a preponderance of evidence.[15] On receiving the writ, the officer should, as soon as his other duties will permit,[16] proceed to make a levy upon property sufficient to satisfy the execution. If he fails to make any

[12] Goode v. Miller, 78 Ky. 235.

[13] Sherrill v. Shuford, 10 Ired. 200; Watkinson v. Bennington, 12 Vt. 404; Neal v. Price, 11 Ga. 297; Lawson v. State, 5 Eng. 28, 50 Am. Dec. 238; Andrews v. Keep, 38 Ala. 315; Griffin v. Isbell, 17 Ala. 184; Barnard v. Ward, 9 Mass. 269; Kimball v. Davis, 19 Me. 310; Lowe v. Ownby, 49 Mo. 71; Kittredge v. Bellows, 7 N. H. 399; Dorrance v. Commonwealth, 13 Pa. St. 160; Ross v. Cave, 49 Mo. 129; Williams v. Lowndes, 1 Hall, 579; Frost v. Dougal, 1 Day, 128; Commonwealth v. Contner, 18 Pa. St. 439; Bowman v. Cornell, 39 Barb. 69; Weld v. Bartlett, 10 Mass. 474; Wakefield v. Moore, 65 Ga. 268; Mathis v. Carpenter, 95 Ala. 156, 36 Am. St. Rep. 187; Armour P. Co. v. Richter, 42 Minn. 188.

[14] Garrett v. Hamblin, 11 Smedes & M. 219.

[15] Bank of Pennsylvania v. Potius, 10 Watts, 148.

[16] Commonwealth v. Gill, 14 B. Mon. 20; State v. Porter, 1 Harr. (Del.) 126.

Digitized by Google

levy, or if, through his delay in levying, the debt is lost, he is responsible to the plaintiff for all the actual damages occasioned by his nonfeasance.[17]

In characterizing the attention which the officer must give to the levy of a writ in his hands, the courts have employed terms not entirely synonymous, and therefore indicating that some of them are more exacting than others. Thus, some courts have said that he must use "diligence";[18] others, that he must use "due diligence";[19] and a still greater number, that he must exercise ordinary and reasonable diligence.[20] He is not required to execute any one writ, regardless of other public duties imposed upon him by law, but he must proceed to display such skill and prudence as a

[17] Clifton v. Hooper, 6 Q. B. 468; 8 Jur. 958; 14 L. J. Q. B. 1; Davidson v. Waldron, 31 Ill. 121, 83 Am. Dec. 206; Miller v. Commonwealth, 5 Pa. St. 294; Baker v. Bower, 44 Ga. 14; State v. Miller, 48 Mo. 251; Bank of Hartford v. Waterman, 26 Conn. 332; McKinney v. Craig, 4 Sneed, 577; Douglass v. Baker, 9 Mo. 41; Carlile v. Parkins, 3 Stark. 163; Palmer v. Gallup, 16 Conn. 562; Parker v. Peabody, 56 Vt. 221; Bank of Rome v. Curtiss, 1 Hill, 275; Terrell v. Fisher, 10 Week. Rep. 796. That the officer's term of office would expire in four days is no excuse for not levying a writ. State v. Roberts, 7 Halst. 114, 21 Am. Dec. 62. An officer may decline to levy because the property will not sell for enough to pay expenses of the sale, but he is liable if his so declining is occasioned by his fraud, or by a mistake in regard to the value of the property. In re Mowry, 12 Wis. 52. If the plaintiff was not injured by the delay, he can recover nothing from the officer. Markle v. Thomas, 13 U. C. Q. B. 321.

[18] Hunter v. Phillips, 56 Ga. 634; Wakefield v. Moore, 65 Ga. 268; Henry v. Commonwealth, 107 Pa. St. 361.

[19] Hallett v. Lee, 3 Ala. 28; Andrews v. Keep, 38 Ala. 315; Harris v. Murfree, 54 Ala. 161; Finnigan v. Jarvis, 8 U. C. Q. B. 210.

[20] Trigg v. McDonald, 2 Humph. 386; Barnes v. Thompson, 2 Swan, 313; State v. Porter, 1 Harr. (Del.) 126; Commonwealth v. Gill, 14 B. Mon. 20; Hutchings v. Ruttan, 6 U. C. C. P. 452; State v. Leland, 82 Mo. 260; Elmore v. Hill, 46 Wis. 618; Hodgson v Lynch, 5 I. R. C. L. 353; Force v. Gardner, 43 N. J. L. 417; Strout v. Pennell, 74 Me. 260; People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418, and note; Pierce v. Jackson, 65 N. H. 121. See ante, § 107.

Digitized by Google

reasonable man would employ in like circumstances.[21]

What constitutes proper diligence is a question of fact for the jury;[22] and, to assist them in the solution of this question, the jury must consider all the facts attending each particular case. Among the most material of the facts thus to be considered are the information which the officer actually possessed, the means by which this information would have been extended, the press of other official duties, and the various hindrances which, without his fault, may have impeded his progress. The issue most frequently to be tried in actions against officers for not levying process is this: Did the defendant in execution have property of which the officer, by the exercise of reasonable diligence, could have had knowledge, and upon which a seizure could have been made? No doubt a prudent plaintiff would, on delivering the writ to the officer, take pains to inform him where property subject to the writ could be found, and would at all times co-operate with the officers in their attempts to execute the writ. The plaintiff who pursues this course places the officer in such a position that his failure to at once proceed to levy gives rise to a presumption of negligence.[23] But the plaintiff is not bound to pursue this course. He need only place the writ in the officer's hands for service. The officer must then make reasonable search and inquiry. If such search and inquiry would have discovered property, their omission cannot be excused by showing that the plaintiff neglected to point out

[21] Crosby v. Hungerford, 59 Iowa, 712; Whitney v. Butterfield, 13 Cal. 336, 73 Am. Dec. 584.

[22] Finnigan v. Jarvis, 8 U. C. Q. B. 210.

[23] Kimball v. Davis, 19 Me. 310; Abbott v. Jacobs, 49 Me. 319; Hunter v. Phillips, 56 Ga. 634; Smith v. Judkins, 60 N. H. 127; Guiterman v. Sharvey, 46 Minn. 183, 24 Am. St. Rep. 218.

Digitized by Google

anything upon which a levy could be made.[24] If the officer has in his hands the proceeds of property sold under an attachment, he is bound, without any special direction or request, to apply them to the satisfaction of the execution when it comes into his hands.[25]

Of course, it may happen that the defendant has property subject to execution of which the officer remains blamelessly ignorant. Hence, the officer is never liable for the result of his ignorance when its existence is consistent with the exercise of ordinary diligence on his part.[26] Possession of property is always prima facie evidence of ownership. When an officer sees a defendant, against whom he holds an execution, in the possession of property, it is his duty to make a levy, unless he knows that the apparent is different from the real ownership. "A sheriff failing to levy on personal property in the possession of the judgment debtor can discharge himself from liability only by showing that the property was not subject to levy, and the burden of proof is on the officer. Where he neglects to levy on personal property in possession of the defendant, he must show that the property was exempt from execution, or must establish such facts as justify his failure to make the levy."[27] The

[24] Hutchings v. Ruttan, 6 U. C. C. P. 452; Fisher v. Gordon, 8 Mo. 386; Tomlinson v. Rowe, Hill & D. 410; Bell v. Commonwealth, 1 J. J. Marsh. 551; Dean of Hereford v. Macknamara, 5 Dowl. & R. 95; Albany City Bank v. Dorr, Walk. Ch. 317; Batte v. Chandler, 53 Tex. 613; Lucier v. Pierce, 60 N. H. 13. A delay to levy the writ for four days entitles the plaintiff to recover for injuries suffered in consequence of such delay. Elmore v. Hill, 51 Wis. 365. See Hearn v. Parker, 7 Jones, 150; Lindsay v. Armfield, 3 Hawks, 548; 14 Am. Dec. 603.

[25] Lucier v. Pierce, 60 N. H. 13.

[26] Barnes v. Thompson, 2 Swan, 313.

[27] Second N. B. v. Gilbert, 174 Ill. 485. 66 Am. St. Rep. 306; Dunlap v. Berry, 4 Scam. 327, 39 Am. Dec. 413.

Digitized by Google

supreme court of Missouri, in considering this question, has given its general views in regard to the liability of sheriffs for not levying process. We make the following quotation from its opinion, though it is probably more favorable toward the officers than are the other authorities upon the same subject: "If they had property when the execution was placed in the hands of the sheriff, which he could have found by the exercise of reasonable diligence, it was his duty to levy it, and failing in this he became liable. But his liability must depend upon the establishment of the fact, by positive or circumstantial evidence, that he had knowledge of property owned by the execution debtor, subject to execution, and on which he could make the levy, or a knowledge of such facts as should cause him to make exertions to find the property. Possession of personal property being prima facie evidence of ownership, whenever it is shown that the sheriff had knowledge that the defendant in execution was possessed of personal property, and he fails to levy upon it, the burden of proof falls upon him to show that the property was not subject to execution." [28]

There may exist reasons why special diligence should be exercised in a particular case. If the existence of such reasons are brought home to the knowledge of the officer, he must govern his actions accordingly. He is required, if possible, to make an immediate levy, where he has reason to judge a delay to be fraught with probable danger.[29] A writ was placed in the hands of an officer at four o'clock in the afternoon, at which time he was informed of the property on which a levy was desired, and that the plaintiff wished

[28] Taylor v. Wimer, 30 Mo. 129.
[29] Tucker v. Bradley, 15 Conn. 46.

Digitized by Google

the levy to be made at once, as he believed that the debtor was about to execute an assignment. The place where the levy was to be made was distant about five miles. The deputy to whom the service of the writ was entrusted started to go by railway, but missed his train because of a change in the time table. He could, however, have taken another train at a later hour on the same afternoon. He made no further attempt until the next morning, when he reached by railway the point of his destination, only to find the store of the defendant closed. Soon after an assignment was made, and the plaintiff lost the benefit of his writ. The officer might easily have procured means of conveying himself to the place where the writ was to be levied within an hour or so after receiving it. In holding that the officer had been guilty of want of diligence, entitling the plaintiff to recover for the loss sustained by him, the court said: "The law is reasonable in this as in all other things. While it holds public officers to a strict performance of their duties and sanctions no negligence, yet it requires no impossibilities and imposes no unreasonable exactions. Reasonable diligence is all that it requires. But what is reasonable diligence depends upon the particular facts in connection with the duty. If this writ had been delivered to defendant without any special instructions, and without informing him of the facts constituting a necessity for its immediate service, it could hardly be claimed that a delay from four o'clock of one day to the forenoon of the next would constitute negligence. But the question of unreasonable delay is a mixed question of law and fact, each case depending on its own circumstances; for the speed with which a sheriff should proceed may depend much upon the special instructions

Digitized by Google

which he receives or upon the apparent necessity for quick action. In view of the special instructions given to the sheriff in this case to proceed at once, and the facts communicated to him showing a special urgency for immediate service of the execution, we think the trial court was fully justified in finding that the delay was unreasonable and negligent." [30]

If the officer attempts to excuse himself for not making a levy, he must show reasonable diligence on his part. He must not return the writ without making inquiries to ascertain whether defendant had any property subject to it.[31] These inquiries should be made at the residence of the defendant, and not on the street, or at other places where neither property nor reliable information is likely to be found.[32] He is not excused because of a mistake in the initials of defendant's name in the writ,[33] nor by his mistaken belief that property in the possession of defendant was exempt from execution.[34] If he claims that property was exempt, the onus probandi rests upon him.[35] Of course, he is not obliged to levy upon exempt property when the debtor claims the benefit of his exemption,[36] and if the property is clearly exempt, probably the officer may rely upon the presumption that if he undertakes to levy thereon, the exemption will be claimed.[37]

A levy must not be made on a nonjudicial day. Thus, the service of writs, in civil cases, on Sundays has al-

[30] Guiterman v. Sharvey, 46 Minn. 183, 24 Am. St. Rep. 219.
[31] Henry v. Commonwealth, 107 Pa. St. 361.
[32] Hinman v. Borden, 10 Wend. 367, 25 Am. Dec. 568; Parks v. Alexander, 7 Ired. 412.
[33] Langley v. Wynn, 70 Ga. 430.
[34] Abbott v. Gillespy, 75 Ala. 180.
[35] Terrell v. State, 66 Ind. 570.
[36] Coville v. Bentley, 76 Mich. 248, 15 Am. St. Rep. 312.
[37] State v. Harper, 120 Ind. 23.

Digitized by Google

ways been regarded as invalid.[38] So it has been held, in one case, that an officer, in the absence of any special urgency, was not justified in making a levy at a late hour in the night.[39] Doubtless, under such circumstances, an officer could not be held guilty of want of diligence because he did not proceed to levy, but we cannot concede that the validity of the levy can be made to depend on the hour of the officer's action. That it was made in the night certainly cannot invalidate it, nor entitle the debtor to have it vacated and the property restored to his possession.[40]

An officer cannot excuse his delay in levying a writ on the ground that irregularities were urged against it by the defendant, and that the officer was advised by his attorney not to proceed, unless such irregularities were in fact sufficient to justify his nonaction. He is bound to know the law, and, at all events, cannot make his ignorance of it a justification for the nonperformance of his duties.[41]

§ 253. Inadequate and Excessive Levies.—An officer charged with the execution of final process should at once levy upon property sufficient to satisfy it. By so doing he is sure to escape the censure and responsibility likely to arise from a needless delay in the performance of his duties. But on many occasions it is not possible to find, at one time and in one place, property sufficient to satisfy the exigencies of the writ. In such cases, several separate seizures are unavoidable.

[38] Bland v. Whitfield, 1 Jones, 122; Van Vechten v. Paddock, 12 Johns. 178; Butler v. Kelsey, 15 Johns. 177; Field v. Park, 20 Johns. 140.

[39] State v. Thackam, 1 Bay, 358.

[40] Vanosdall v. Hamilton (Mich.), 77 N. W. 9; Solinsky v. Lincoln S. B., 85 Tenn. 368.

[41] Treadwell v. Beauchamp, 82 Ga. 736.

Digitized by Google

The officer must first levy upon the property first found, and must proceed to make such additional levies as may be necessary to enforce full payment of his writ. When he has levied upon personal property sufficient to satisfy his writ, his authority to make further levies may be assailed on the ground that the levy already made operates until disposed of as a conditional satisfaction of the judgment.[42] While the judgment is thus apparently satisfied, the sheriff should not further embarrass the debtor by making additional levies, and, if he does so, the defendant is entitled to relief either by some motion or proceeding in the case, or by an independent action to recover for the injuries sustained. But even where the officer, in the first instance, finds sufficient property, various causes may arise prompting him to levy upon a part only. The levy upon this part is no waiver of the right to make a further levy at a subsequent period. In fact, the general rule prevails, without exception, that an officer, notwithstanding his prior levy, has at any time before the return day the power to make such further seizures as may be necessary to satisfy the plaintiff's debt.[43]

It is the duty of the officer, on the one hand, to avoid making an inadequate, and, on the other hand, to avoid making an excessive levy. For an error of conduct in

[42] Rapier v. Gulf etc. Co., 69 Ala. 476; Dougherty v. Marsh, 11 Ga. 277; Horn v. Ross, 20 Ga. 210, 65 Am. Dec. 621; Harmon v. State, 82 Ind. 197; Wood v. Conrad, 2 S. D. 405.

[43] Moses v. Thomas, 2 Dutch. 124; Van Waggoner v. Moses, 2 Dutch. 570; Denvrey v. Fox, 22 Barb. 522; Ind. C. R. W. Co. v. Bradley, 15 Ind. 23; Marshall v. Morris, 13 Ga. 185; Pugh v. Callaway, 10 Ohio St. 488; Webb v. Camp, 26 Ga. 54; Montgomery v. Wayne, 14 Ill. 373; Howard v. Bennett, 72 Ill. 297; Colburn v. Barton, 17 Ill. App. 391; Everingham v. National City Bank, 124 Ill. 527; Dodge v. Doane, 8 Cush. 460; Hombs v. Corbin, 20 Mo. App. 497.

Digitized by Google

either respect, he is responsible to the person damaged. He is always to remember that the writ is designed as an instrument of justice, and ought not to be made an instrument of oppression. In order that his levy may not be inadequate, he should calculate the value of the property seized, not at its market price, but at the price which it is likely to produce at a forced sale, at the time and in the place where such sale is to be made.[44] He should also consider the pre-existing liens or claims brought within his knowledge, for, as the duty of the officer is to produce satisfaction of the writ, his inquiry is not addressed solely to the value of the property which he has seized, but also to the question how much of that value may probably be appropriated to the satisfaction of the plaintiff's demand. Hence, if the property must be sold subject to a pre-existing lien, or if, though sold free of such lien, it will be the duty of the officer to first satisfy it out of the proceeds of the sale, then the levy should be upon property sufficient to satisfy the writ after providing for such lien.[45] If, having ample property within his reach, he makes a levy which proves—by the test we have just laid down—to be inadequate, he is responsible to the plaintiff,[46] unless the inadequacy has resulted from an unusual depreciation in the value of the property, occurring subsequently to the levy.[47] "It is no doubt the duty of an officer, in levying, to take prop-

[44] French v. Snyder, 30 Ill. 339, 83 Am. Dec. 193; Lawson v. State, 5 Eng. 28, 50 Am. Dec. 238; Governor v. Powell, 9 Ala. 83; Griffin v. Ganaway, 8 Ala. 625.

[45] Mullings v. Bothwell, 29 Ga. 706; Hefner v. Hesse, 29 La. An. 149; Landreaux v. Hazelton, 1 Martin N. S. 600.

[46] Ransom v. Halcott, 18 Barb. 56; French v. Snyder, 30 Ill. 339, 83 Am. Dec. 193; Hall v. Tomlinson, 5 Vt. 228.

[47] Governor v. Carter, 3 Hawks, 328, 14 Am. Dec. 588.

Digitized by Google

erty enough, if to be had, to satisfy the execution in his hands. It is not admitted, however, that the discharge of his duty requires him, at his peril, to seize on property to an extent sufficient, when it is disposed of by public sale, to raise in any event a sum sufficient for this purpose. In the performance of this duty he must exercise a prudent, reasonable, and cautious discretion. If he fails to do this, it is a violation of his duty. He is, in this respect, to be governed by the rules which influence the conduct of discreet and prudent men in the management of their own affairs. He must take into his possession an amount of property sufficient, when sold, in all reasonable probability—making a proper allowance for the sacrifice usually incident to officers' sales—to bring a sum that will pay off the execution in his lands. But he may be liable, on the other hand, to the defendant in the execution, if he make an excessive levy. He is therefore to perform his duty as sheriff, having an eye to the security of the plaintiff's debt, and avoiding all acts of oppression toward the defendant." [48] "It is indispensable, however, that a certain amount of discretion be intrusted to the officer who makes the levy, because of the impossibility of fixing certain rules applicable to all cases which shall govern him, and the propriety of his action must therefore be determined in each case by the facts and circumstances of that case." [49]

The fact that the property seized, when exposed to execution sale, realizes a sum far less than that which the officer is commanded to make by his writ, tends very strongly to establish that he was guilty of negli-

[48] Commonwealth v. Lightfoot, 7 B. Mon. 298.
[49] Cornelius v. Burford, 28 Tex. 209, 91 Am. Dec. 309.

Digitized by Google

gence, if he had an opportunity to levy on other property. If he levies on an amount of goods which are no more than sufficient to satisfy his writ, if sold at their invoice price, "leaving no margin for depreciation in value from delay, forced sale, or otherwise, or for incidental expenses and costs," he is answerable to the plaintiff for any deficiency which may remain after the sale.[50] When not personally familiar with the value of the property about to be levied upon, the officer must seek information from disinterested persons—those who would not, from their relationship to the property or the parties, be suspected of a desire to deceive him. If he merely consults the defendant and persons in his employ, this is not the exercise of a sound discretion, nor of ordinary prudence and care; and the officer is answerable if his levy proves inadequate, unless he can show that such inadequacy resulted from a remarkable and unexpected depreciation in the value of the property.[51]

The officer is or should be a minister of justice, not of oppression; and he should execute every writ put in his hands in such a manner as to do as little mischief to the debtor as possible.[52] While the liability of an officer for an excessive levy is undoubted,[53] the instances in which actions for such levies have been sustained are rare. This is because the officer must be

[50] Dewitt v. Oppenheimer, 51 Tex. 108; Atcheson v. Hutchison, 51 Tex. 223.

[51] Adams v. Spangler, 17 Fed. Rep. 133; Alexander v. State, 42 Ark. 41.

[52] Handy v. Clippert, 50 Mich. 355.

[53] Wordye v. Baily, Noy, 39; Dezell v. Odell, 3 Hill, 215; Jones v. Davis, 2 Ala. 730. An officer levying on part of a large quantity of property may take and retain possession of the whole, so far as may be necessary to separate and dispose of the part levied upon. Morgan v. Spangler, 14 Ohio St. 116.

Digitized by Google

allowed to exercise his own judgment in determining how much property it is necessary to seize, and because he must be permitted to steer clear of liability for an inadequate levy. The few cases in which officers have been held responsible for excessive seizures will, we think, on examination, be found confined to instances where the excess was so great and so perceptible that it must be attributed either to inexcusable ignorance or willful oppression.[54] An officer attached real property of the defendant, which, if unencumbered, was of value sufficient to satisfy the writ a dozen times. Without knowing whether the realty was encumbered or not, he attached certain personal property, and was thereafter sued for an excessive levy. The court said: "The claim that the attachment was excessive and unlawful, because the defendant officer, before attaching the chattels, had, on the same writ, commanding him to attach property of the value of three hundred dollars, attached the plaintiff's real estate, valued at four thousand dollars, cannot be upheld on any facts stated in the case. To make an officer a trespasser for exceeding or abusing his authority, he must be shown to have committed acts which persons of ordinary care and prudence would not, under like circumstances, have committed, and made such a departure from duty as to warrant the conclusion that he intended from the first to do wrong, and use his legal authority as a cover for an illegal act. (Taylor v. Jones, 42 N. H. 25, 35; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459.) It

[54] Ventris v. Brown, 22 U. C. C. P. 345; Harrison v. Harwood, 31 Tex. 650; Sexey v. Adkison, 40 Cal. 408. The following levies were adjudged to be excessive: A levy on $800 worth of realty for $21 (Cook v. Jenkins, 30 Iowa, 452); a levy on a steamboat worth $35,000, for $109 (Silver v. McNeil, 52 Mo. 518; Atcheson v. Hutchison, 51 Tex. 223).

Digitized by Google

does not appear that the officer acted in bad faith in making the attachment, or that he was culpably negligent in not ascertaining the value of the real estate, or that it was unencumbered, before attaching the personal property." [55] The officer must not be ignorant of the value of the property when information can be readily obtained. Hence, he is responsible for seizing a very valuable horse, worth hundreds of dollars, under a writ for ten or twenty dollars, when he could as easily have taken common horses, and when he could have learned the quality and value of the property by ordinary inquiry.[56] Where, however, the value of the property is very uncertain, the sheriff is not to be deemed guilty of misconduct because the quantity levied upon turns out to be largely in excess of the demand.[57] When the property, without fault of the officer, fails to bring sufficient to satisfy the writ, this fact is a conclusive refutation of the charge that the levy was excessive.[58] An excessive levy is not void. On the contrary, it is, until set aside, perfectly valid.[59] In a few instances, in which very excessive levies have been succeeded by grossly inadequate sales, the interposition of courts of equity has been successfully invoked to set aside both levy and sale.[60] But this relief is rarely granted. The defendant is usually restricted to his legal remedies,

[55] Davis v. Webster, 59 N. H. 471.

[56] Vance v. Vanarsdale, 1 Bush, 504.

[57] Sexey v. Adkison, 40 Cal. 408.

[58] Lynn v. Sisk, 9 B. Mon. 135; Ingram v. Belk, 2 Strob. 207.

[59] Campau v. Godfrey, 18 Mich. 27; Dezell v. Odell, 3 Hill, 215; Brown v. Allen, 3 Head, 429; Pugh v. Calloway, 10 Ohio St. 488; Black v. Nettles, 25 Ark. 606; Brown v. Cougot, 8 Rob. (La.) 14; Backus v. Barber, 107 Mich. 468; Green v. Burke, 23 Wend. 490; McConnell v. Kaufman, 5 Wash. 686.

[60] Cook v. Jenkins, 30 Iowa, 452; Tiernan v. Wilson, 6 Johns. Ch. 411; Stead's Ex'r v. Course, 4 Cranch, 403.

Digitized by Google

and compelled to seek redress by an action against the officer, or by a motion asking the court to prevent an oppressive use of its process.[61] Where the defendant points out property to be taken in execution, he cannot afterward, especially as against a third person, object to the levy as excessive.[62] An officer, convinced that his levy is excessive, may release a portion of the property.[63] In Indiana it has been decided that though a levy on real estate was excessive, the defendant has no cause of action if no more land is sold than is required to pay the debt.[64] We doubt the soundness of this decision. If any damages are occasioned by a levy so aggravated in its character that the court feels bound to pronounce it excessive, a cause of action must immediately arise in favor of the defendant. That the levy is afterward wholly or partly relinquished, can hardly be a sufficient answer to a claim for damages suffered before the relinquishment. If the judgment creditor knowingly procures the sheriff to make an excessive levy, he, as well as the officer, is answerable to the defendant for damages suffered thereby. But before either can be made so answerable, the excess must be so great as to indicate a malicious use of the process.[65]

§ 254. Whose Property may be Taken, and of the Right to Indemnity.—Writs of execution may be divided into two classes, viz.: 1. Those which direct the officer to seize specific property; and 2. Those which, without containing any special directions with respect

[61] Campau v. Godfrey, 18 Mich. 27.
[62] Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309.
[63] Black v. Nettles, 25 Ark. 606.
[64] Drake v. Murphy, 42 Ind. 82.
[65] Beasly v. Johnson, 10 Heisk. 413.

Digitized by Google

to the property to be seized, command him to satisfy the writ out of the property of the defendant. In serving writs of the first class, the officer has no further inquiry to make than such as satisfies him that the property seized is that described in his writ. "He has no discretion to use, no judgment to exercise, no duty to perform, but to seize the property described. It follows from this, as a rule of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts." [66] Hence, if an officer seizes a chattel under a possessory warrant commanding him so to do, he cannot be made answerable at the suit of a third person claiming to be the owner of the property. The officer's "custody is the custody of the law, and the law will not adjudge its own custody illegal. One court will not interfere with the administration of another court of competent jurisdiction, and treat the mere performance of ministerial duty by a faithful officer as a wrongful conversion of property." [67]

A writ, though for the possession of specific chattels which it describes, may command the officer to take them from the possession of the defendant. If so, it

[66] Buck v. Colbath, 3 Wall. 343; Hallett v. Byrt, Carth. 390; Wallace v. Holly, 13 Ga. 389; Watkins v. Page, 2 Wis. 92; State v. Hailey, 71 Mo. App. 200; Sutsman Co. v. Wallace, 142 U. S. 310.

[67] Chipstead v. Porter, 63 Ga. 220; Shipman v. Clark, 4 Denio. 446, 47 Am. Dec. 264; Griffith v. Smith, 22 Wis. 646, 99 Am. Dec. 90; Philips v. Spotts, 14 Neb. 139; Union L. Co. v. Tronson, 36 Wis. 126; Bullis v. Montgomery, 50 N. Y. 355. Contra, Ohio v. Jennings, 4 Ohio St. 418.

Digitized by Google

does not justify him in taking the goods from the possession of a stranger to the writ to whom they belong.[68] The codes of many of the states have authorized an action or proceeding commonly known "as claim and delivery," in which, if an immediate delivery of chattels is sought, a certain affidavit may be made and undertaking given, and "the plaintiff or his attorney may thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant." This indorsement and the affidavit constitute the officer's process, and they justify him in taking the chattels from the possession of the defendant, though they may be the property of a third person;[69] but it is otherwise if they are found in and taken from the possession of such third person, for the language of the endorsement is "to take the same from the defendant."[70] "Unlike an execution, a requisition in claim and delivery points out the specific property to be seized by the officer, and peremptorily directs him to take and hold it thereunder. Having obeyed the court whose executive officer he is, by taking from the possession of the defendant in the requisition (for if he take it from another, a different question is presented) the very property described in the requisition, no tribunal will, without a statute, hold him responsible to a third person for his act."[71]

[68] Lyon v. Goree, 15 Ala. 360.

[69] Willard v. Kimball, 10 Allen, 211, 87 Am. Dec. 632; Shipman v. Clark, 4 Denio, 446, 47 Am. Dec. 264; Boyden v. Frank, 20 Ill. App. 169; Foster v. Pettibone, 20 Barb. 350.

[70] Bullis v. Montgomery, 50 N. Y. 355; King v. Orser, 4 Duer, 431; Stimson v. Reynolds, 14 Barb. 506; Gross v. Bogard, 18 Kan. 288; Otis v. Williams, 70 N. Y. 208.

[71] Welter v. Jacobson, 7 N. D. 32, 66 Am. St. Rep. 636.

Digitized by Google

With respect to writs of the second class, the officer must seize the property of the defendant, and none other. His duty is to search for the property of the defendant, without even the aid of instructions from the plaintiff. The determination of the question whether this duty has been adequately performed must generally be difficult and uncertain. But there is another duty devolving upon officers which is even more difficult to discharge. This duty is that of determining the ownership of property when found by the officer, or pointed out by the plaintiff. The writ commands the officer to take the defendant's property. This command must be obeyed, though the property is in the possession of a third person.[72] When property is pointed out by the plaintiff as that of the defendant, the officer must levy, or must justify his failure to levy by proving that the ownership was not in the defendant. He cannot shield himself by showing that he had doubts or suspicions regarding the title. He must go further, and establish that they were well founded.[73] On the other hand, the officer has no authority for touching the property of any person except that of the defendant. If he does so, the writ affords no justification;[74] for the act is not in obedience to its

[72] Emanuel v. Cocke, 6 Dana, 212; James v. Thompson, 12 La. Ann. 174.

[73] People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418; Hunter v. Maddox, 1 Hann. (N. B.) 162; Marshall v. Simpson, and Peet v. Simpson, 13 La. Ann. 437; Levy v. Shockley, 29 Ga. 710; West v. St. John, 63 Iowa, 287.

[74] Albright v. Mills, 86 Ala. 324; Carpenter v. Innes, 16 Colo. 165, 25 Am. St. Rep. 255; Sperry v. Ethridge, 70 Ia. 30; Macias v. Lorio, 41 La. An. 300; Granning v. Swenson, 49 Minn. 381; Caspar v. Klippen, 61 Minn. 353, 52 Am. St. Rep. 604; State v. Armstrong, 25 Mo. App. 532; Brownell v. McCormick, 7 Mont. 12; North v. Peters, 138 U. S. 284; Rhodes v. Patterson, 3 Cal. 469; Van Pelt v. Littler, 14 Cal. 194; Saunderson v. Baker, 3 Wils. 309; 2 W. Black

Digitized by Google

mandate. The dilemma in which the officer is necessarily placed is thus described, and perhaps somewhat exaggerated, in the case of Bradley v. Holloway:[75] "By the common law, the sheriff is bound, when he receives an execution, to make reasonable inquiry to ascertain if the defendant has any property in his county subject to levy; and if he finds the defendant in the possession of any, whether it is claimed by a third person or not, he will be liable to the plaintiff in an action for a false return if he fails to levy, and the burden of proof will fall on him to show that such property was not in fact subject to execution. If, on the other hand, he makes a levy, and the goods do not belong to the defendant, he is liable to the owner in an action of trespass. Though the owner may assert his title in the most solemn form, and exhibit proof of it to the officer, the latter cannot require indemnity from the plaintiff, who may fold his arms and say to the sheriff, 'Do your duty at your peril'; and in this dilemma, liable on one hand to an action for a false return, and on the other to an action of trespass, the sheriff must judge for himself both the law and the facts." While the sheriff, in the exercise of his duty, necessarily, to a very considerable extent, proceeds at his peril, his position has never been quite so embarrassing, and so without means of relief, as is indicated by the language just quoted. It is true that an officer

832; Ackworth v. Kempe, 1 Doug. 40; Pacific Ins. Co. v. Conard, 1 Bald. 138; Sangster v. Commonwealth, 17 Gratt. 124; Carmack v. Commonwealth, 5 Binn. 184; State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; Wilton Town Co. v. Humphrey, 15 Kan. 372; Archer v. Noble, 3 Greenl. 418; Harris v. Hanson, 11 Me. 241; People v. Schuyler, 4 N. Y. 173; State v. Tatom, 69 N. C. 35; Jarmain v. Hooper, 7 Scott N. R. 663; 1 Dowl. & L. 769; 6 Macn. & G. 827; 8 Jur. 127; 13 L. J. Com. P. 68.

[75] 28 Mo. 151.

Digitized by Google

could not, at common law, return a writ nulla bona because he had doubts concerning the title of property, nor because adverse claims were made to its ownership. On making such return, he would be liable to the plaintiff, if the latter could establish its falsity. But the English courts, nevertheless, found means to protect their officers. When it was shown to these courts that there was property which might be subject to the writ, but concerning the title to which the officers had reasonable doubts, the time for making a return was extended until the parties in interest should indemnify the officers for proceeding.[76] In some of the states a position has been taken in favor of the officer, far in advance of that indicated by the English decisions. Thus in Massachusetts, the supreme court, by Chief Justice Parker, said: "An officer called upon to serve a precept, either by attaching property, or arresting the person, if there be any reasonable ground to doubt his authority to act in the particular case, has a right to ask for an indemnity. He is not obliged to serve process in civil actions at his own peril, when the plaintiff in the suit is present, and may take the responsibility upon himself, and it has been decided that the sheriff has a right to require indemnity of the creditor when he shall be directed to attach chattels, the property in which may be questionable. The same right exists when the sheriff shall be directed to arrest the body of any man, and he has reasonable doubts

[76] Thurston v. Thurston, 1 Taunt. 120; MacGeorge v. Birch, 4 Taunt. 585; King v. Bridges, 1 J. B. Moore, 43; 7 Taunt. 294; Burr v. Freethy, 1 Bing. 71; 6 J. B. Moore, 79; Wells v. Pickman, 7 Term Rep. 174; Miller v. Commonwealth, 5 Pa. St. 297; Dewey v. White, 65 N. C. 225; Bosley v. Farquar, 2 Blackf. 61; Forniquet v. Tegarden. 24 Miss. 96; Bryan v. Bridge, 6 Tex. 143; Jessup v. Brown, 2 Gill & J. 404; Adair v. McDaniel, 1 Bail. 158.

Digitized by Google

of the identity of the person. There can be no reason why the same principle should not apply where there may be doubts of the lawfulness of the arrest on other grounds." [77]

As an officer has no right under a writ against one person to levy upon property of another, and must be considered as a trespasser if he does so, there would appear, upon principle, to be no reason why the person whose property is thus being interfered with without any lawful authority might not oppose force by force and thus prevent the levy, if within his power, and there are decisions which so affirm.[78] Though it

[77] Marsh v. Gold, 2 Pick. 290; Marshall v. Hosmer, 4 Mass. 63; Bond v. Ward, 7 Mass. 125, 5 Am. Dec. 28; Forniquet v. Tegarden, 24 Miss. 96; Long v. Neville, 36 Cal. 445, 95 Am. Dec. 199; Chamberlain v. Beller, 18 N. Y. 115; Evans v. Graham, 37 W. Va. 657. The matter of indemnity will be further considered in this work. See post, § 275.

[78] State v. Johnson, 12 Ala. 840, 46 Am. Dec. 283; Commonwealth v. Kennard, 8 Pick. 133; Wentworth v. People, 4 Scam. 550. Thus in the case last cited the court said: "The question then arises, whether the defendant was warranted in using such force as was necessary to retain possession of his property against the attempted seizure of the officer, by virtue of the attachment against the goods of Herriford. This point, I conceive, is also well settled. The position that policy requires that an officer clothed with the authority of the law should be protected in the discharge of his duty is admitted to the fullest extent; but it does not follow from this admission that the constable was justified in seizing the goods of the defendant under an attachment against those of Herriford. An officer in the execution of the process of the law is entitled to its protection so long as he keeps himself within the pale of his authority, but no longer. The process is a sufficient warrant for the execution of its commands, but affords no authority to go beyond or contrary to its injunctions; and when the officer does so, he that instant ceases to be the minister of the law and becomes its violator. What, then, was the authority conferred by the writ under which the officer professed to act in this case? Certainly not to take the goods of the defendant, but those of Herriford. He had no better right, therefore, to take the goods of the defendant, by virtue of a writ commanding him to take the goods of Herriford,

Digitized by Google

is difficult to controvert the reasons upon which these decisions have been supported, it is, nevertheless, true upon grounds of public policy that a citizen should not be encouraged to resist

than he would have to do so without a process against any one. If the act of the constable was in violation of law, was not the defendant justified in resisting him? Although the policy of the law affords ample protection to its officers while in the discharge of their official duties, yet it does not clothe them with a mantle of immunity against a violation of its precepts or the rights of the citizen, nor does it give to his acts such a sanction as to require the citizen to submit to an invasion of the latter's rights without resistance. It seems to be conceded that if an officer, by virtue of a process against one person, offers to take into custody another, he may be resisted, and that the officer alone will be responsible for the consequences. Upon this principle, then, the resistance of the defendant was justifiable, for the law equally allows the protection of one's property and person from illegal aggression. From the principles thus stated it results that, in a case like the present, each party acts at his peril, and he only is amenable to the law who it can be shown has violated it. If the officer acts in violation of the command of the writ, by attempting to seize the person or property of one not liable to be taken by it, he becomes the wrongdoer, and may be resisted; but if it turns out that the person or property was subject to its operation, then those who resist its execution are guilty of an infraction of the law and subject to its punishment. The reciprocal obligation to look to, and abide by, the consequences of their conduct, is just and equal, and whatever hardship or inconvenience this may impose upon the officer is a consequence incident to the nature of his office; but there is little necessity for him either to incur responsibility, or allow the mandates of the law to be put at defiance, for he is not required to levy a writ against the property of one man, upon that of another; and when his opinion as to the ownership of property in possession of, or claimed by another, is well grounded, he may call to his aid the power of the county in executing his process; and, after levy, he can have a controverted title tried by a jury; whose verdict will be a guide and warrant for his future action; while, on the other hand, to deny to the citizen the authority to assert his undoubted rights, but require him quietly to submit to their invasion, under color of process, at the mere caprice of every one clothed with a little brief authority, would be to convert the law, which he should be able to look to for protection against wrong, into a scourge and an instrument of oppression. It would not do to say that the individual should appeal to the law in every case, and submit to a trial

Digitized by Google

an officer of the law charged with the service of process, even though, in so doing, it may happen that he departs from its commands or otherwise exceeds the limits of his authority. The majority of the decisions affirm that if the officer does not act wantonly or in bad faith, an owner has no right to resist a levy upon personal property though he is not a party to the writ, and the levy, if made, cannot be justified, and must leave the officer subject to liability as a trespasser. We do not know how an owner can determine, when an officer is attempting a levy upon his property, whether the latter is acting in good faith or not, and we do not understand how the test of good faith can be applied to transactions of this character. There is no doubt that the owner of property can proceed somewhat farther in his efforts to avoid a levy thereon than could a stranger who is in nowise interested therein. The better opinion, however, is, that the owner, though the writ is against another, must, in his resistance, stop short of actual force, and, instead of attempting to redress his grievance by personal combat or the opposition of force by force, must seek redress in the courts, either by an action to recover the property from the officer wrongfully levying upon it, or to obtain compensation for the trespass or conversion involved in such levy.[79]

of the right of property. This would unquestionably be prudent in doubtful cases, but in many it would be a very inadequate remedy, and in some a mere mockery of justice. Suppose an officer should, out of pure wantonness, seize the horse of a traveler upon the highway, under the authority of a writ against the property of another, or even without any writ, for his authority for the act would be the same in either case. Can it be contended that the owner of the horse would have no right to repel this aggression on his property? Surely not."

[79] State v. Fifield, 18 N. H. 34; State v. Richardson, 38 N. H. 208, 75 Am. Dec. 173; People v. Hall, 31 Hun, 404; Faris v. State, 3 Oh.

Digitized by Google

When an officer levies on property not belonging to the defendant, no demand need be made for its return.[80] His act makes him a trespasser, and, being such, he is entitled to no indulgence. "The sheriff, having misapplied his process, and whether by mistake or design will make no difference, stands in the position of every other trespasser, and is liable to an action the instant the trespass is committed. The circumstance that the property was in the possession of execution debtor at the date of the seizure amounts to nothing, except upon proof of fraud or commixture."[81] This statement requires some modification. If the property is in possession of the defendant in execution, it is prima facie his. The officer may, therefore, levy upon it, if he knows nothing to rebut this presumption, and cannot be charged as guilty of a conversion, unless, after notice that it belongs to another, he insists upon retaining possession of it and refuses to deliver it to the owner.[82]

An officer levying upon and selling the property of a stranger to the writ cannot escape from liability by professing to seize and sell only the right, title, and interest of the defendant in the action,[82a] when such de-

St. 159; State v. Miller, 12 Vt. 437; Merritt v. Miller, 13 Vt. 416; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482.

[80] Ledley v. Hays, 1 Cal. 160; Jamison v. Hendricks, 2 Blackf. 94, 18 Am. Dec. 131; Hicks v. Cleveland, 48 N. Y. 84; Kluender v. Lynch, 2 Abb. App. 538; Glossop v. Pole, 3 Maule & S. 175; Glasspoole v. Young, 9 Barn. & C. 696; Edwards v. Bridges, 2 Stark. 396; Paige v. O'Neal, 12 Cal. 495; Wellman v. English, 38 Cal. 584; Shain v. Nunan, 68 Cal. 235; Burchett v. Purdy, 2 Okla. 371.

[81] Harpending v. Meyer, 55 Cal. 560; Black v. Clasby, 97 Cal. 482; Boulware v. Craddock, 30 Cal. 190; contra, Vose v. Stickney, 8 Minn. 75; Dodge v. Chandler, 9 Minn. 97.

[82] Fuller D. Co. v. McDade, 113 Cal. 360.

[82a] Leonard v. Maginnis, 34 Minn. 506; Rankin v. Ekel, 64 Cal. 446.

Digitized by Google

fendant has no right, title, or interest. Though the property belongs to the defendant in the writ, there may be circumstances forbidding the levy of an execution upon it, as where it is subject to a mortgage or pledge, and the statute of the state forbids any levy thereon without first tendering to the mortgagee or pledgee the amount of his debt. In such a case, a levy not preceded by such tender exposes the officer to liability to the mortgagee or pledgee for the amount of the debt, if the property is worth so much.[83]

The owner whose property has been taken under a writ to which he was not a party has his choice of remedies by which to seek redress.[84] He may sue in trespass or trover,[85] or in replevin he may recover possession of the property taken.[86]

The wrongful act of the officer, in levying upon the property of one person under a writ against another, is not a mere private trespass; it is official. Though done in violation of the mandate of the writ, it is, nevertheless, regarded as done under the writ, and is redressed accordingly. Though done by a deputy, it is the act of the principal. And whether done by principal or deputy, the liability arising is one which the sureties on the official bond of the principal may be compelled to discharge.[87] Upon this question the de-

[83] Irwin v. McDowell, 91 Cal. 119; Metzler v. James, 12 Colo. 322; Collins v. State, 8 Ind. App. 542, 50 Am. St. Rep. 298.

[84] Yarborough v. Harper, 25 Miss. 112.

[85] Lyon v. Goree, 15 Ala. 360; Hanchett v. Williams, 24 Ill. App. 56; Burgin v. Burgin, 1 Ired. 453; Kitchen v. McCloskey, 150 Pa. St. 376, 30 Am. St. Rep. 811; Duncan v. Stone, 45 Vt. 118.

[86] Gimble v. Ackley, 12 Iowa, 27; Smith v. Montgomery, 5 Iowa, 370.

[87] Van Pelt v. Littler, 14 Cal. 194; State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; Commonwealth v. Stockton, 5 T. B. Mon. 193; Carmack v. Commonwealth, 5 Binn. 184; Sangster v. Commonwealth,

Digitized by Google

cisions are not entirely harmonious. The minority insist that the act of an officer levying a writ upon the property of a stranger thereto is not an official act; that it is an act "colore officii, but not virtute officii"; that as the officer has no more authority to make such levy than if he were a private person, his act must be imputed to him in his private rather than his official capacity; and, therefore, that it is not an act for which the sureties on his official bond are answerable.[88] To this argument the reply is made (and we think it unanswerable) that the officer is acting in his official capacity whenever he seizes property for the purpose of satisfying a writ in his hands; that his bond is conditioned for the faithful discharge of the duties of his office, and the levy on the goods of a stranger is not a faithful discharge of such duties, and is, therefore, a breach of such condition; and that if the condition of the bond is interpreted as applying only to acts which the officer may rightfully do, there can never be any recovery under it, because for acts rightfully done there is no liability to any one. "The object of the bond given by an officer is to make the sureties responsible for the due performance of his official acts in the service of process, and in his other duties. By an official act is not meant a lawful act of the officer in the service

17 Gratt. 124; Archer v. Noble, 3 Greenl. 418; Harris v. Hanson, 11 Me. 241; Forsythe v. Ellis, 4 J. J. Marsh. 299, 20 Am. Dec. 218; People v. Schuyler, 4 N. Y. 173, overruling Ex parte Reed, 4 Hill, 572; Walsh v. People, 6 Ill. App. 204; People v. Mersereau, 74 Mich. 687; Lowell v. Parker, 10 Met. 309, 43 Am. Dec. 436; Walker v. Wonderlick, 33 Neb. 504; Rogers v. Weir, 34 N. Y. 465; Bishop v. McGillis, 80 Wis. 575, 27 Am. St. Rep. 63; Lammon v. Feusier, 111 U. S. 21.

[88] Eaton v. Kelly, 72 N. C. 110; State v. Conover, 4 Dutch. 224, 78 Am. Dec. 54; State v. Brown, 54 Md. 318; see, also, State v. Brown, 11 Ired. 141.

Digitized by Google

of process; if so, the sureties would never be responsible. It means any act done by the officer in his official capacity, under color and by virtue of his office." [89] "The sheriff received the process in virtue of his office. His sureties undertook that he would 'well and truly' execute the process. This he failed to do, to the injury of the plaintiff. He was guilty of malfeasance in attempting to perform an official duty; and we think that, upon principle and upon grounds of public policy, the responsibility of his sureties should be different from those they would incur if the sheriff had seized the goods of the plaintiff without any process whatever. In that case he would act in his own right, and might be resisted as any other wrongdoer. In the present, he was put in motion by legal authority invoked in behalf of others, and could compel the power of the county to aid him in its execution. His official character would forbid opposition. We think the weight of authority and principle concur in holding his sureties responsible for his malfeasance." [90] The act of an officer is not official when not based on any process in his hands. Hence, though he claims to have a writ in his hands, and to be proceeding pursuant to its mandate, his sureties are not answerable if in fact no such writ had ever been received by him.[91] Where a stranger to the writ causes his property to be levied upon by pointing it out to the officer as the property

[89] Turner v. Sisson, 137 Mass. 191; Horan v. People, 10 Ill. App. 21; Greenfield v. Wilson, 13 Gray, 384; Jones v. People, 19 Ill. App. 300; Ohio v. Jennings, 4 Ohio St. 418; Noble v. Himeo, 12 Neb. 193; Charles v. Haskins, 11 Iowa, 329, 77 Am. Dec. 148; Meadow v. Wise, 41 Ark. 285; Brunott v. McKee, 6 Watts & S. 513; State v. Mann, 21 Wis. 684.

[90] Holliman v. Carroll, 27 Tex. 27, 84 Am. Dec. 606.

[91] Gerber v. Ackley, 37 Wis. 43; 32 Wis. 234, 19 Am. Rep. 751.

Digitized by Google

of the defendant, he is estopped from sustaining any action against the officer for its recovery, or for the recovery of damages for its conversion.[92]

If an execution is against two or more defendants, each is, as between him and the plaintiff, answerable for the whole amount of the judgment, and it is not within the province of the officer to inquire respecting the equities of the defendants among each other, nor to assume that each is answerable for a part only of the debt, and, hence, to levy upon the property of each, so that all may be made to contribute to the satisfaction of the writ. Of course, another duty is to levy upon sufficient property to satisfy the writ and to see that it belongs to some of the defendants. The result of this is, that he may satisfy the writ entirely out of the property of one of the defendants, leaving him to seek redress from the codefendants, if, as among them, it was inequitable for him to discharge the whole of the debt.[93]

§ 254 a. Levy upon Property of Which Defendant is not an Owner in Severalty.—The officer may discover property belonging partly to the defendant and partly to others. The several owners may be cotenants, or they may be copartners. In either event, the defendant has an interest subject to execution. If the defendant is a cotenant, the officer may seize the property and take it into his exclusive possession. He may hold it until the day of sale. The other cotenants, though

[92] Chapman v. O'Brien, 34 N. Y. Sup. Ct. (2 Jones & S.) 524.

[93] Gregg v. Crawford, 4 Ala. 180, 37 Am. Dec. 739; Keaton v. Cox, 26 Ga. 162; Starry v. Johnson, 32 Ind. 440; Parker v. Dennie, 6 Pick. 277; Root v. Wagner, 30 N. Y. 9, 86 Am. Dec. 348; Burdick v. Burdick, 16 R. I. 495; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Warren v. Edgerton, 22 Vt. 199, 54 Am. Dec. 66; Hyde v. Rogers, 59 Wis. 154.

Digitized by Google

strangers to the writ, are without remedy.[94] This is merely one of the disagreeable incidents of their joint ownership. In no other way could the interest of the defendant be subjected to execution; for an execution sale of chattels not in the possession of the sheriff, nor present at the sale, would invite their sacrifice, and could not be tolerated. Taking possession is not optional with the officer. He must take possession, or in some way subject the property to his control, in order to make a valid levy and sale.[95] The levy and sale must be consistent with the defendant's interest. If the levy or sale purports to be upon an estate in severalty, this is an invasion of the rights of the cotenants who are not parties to the writ for which they may sustain an action against the officer making it.[96] In a few of the states statutes have been enacted changing the common-law rule respecting the levy upon personal property of which the defendant owns but an undivided interest, so as to authorize such levy to be made without taking possession. Where these statutes are in force, an officer has no authority to deprive one coowner of his possession for the purpose of levying a writ against another.[97]

When the defendant is a member of a copartnership,

[94] Freeman on Cotenancy and Partition, §§ 214, 215; Pettingill v. Bartlett, 1 N. H. 87; Blevins v. Baker, 11 Ired. 291; Haskins v. Everett, 4 Sneed, 531; Waldman v. Broder, 10 Cal. 378; Walsh v. Adams, 3 Denio, 125; Bernal v. Hovious, 17 Cal. 547, 79 Am. Dec. 147; Caldwell v. Auger, 4 Minn. 217, 77 Am. Dec. 515; Waddell v. Cook, 2 Hill, 48, 37 Am. Dec. 372; Phillips v. Cook, 24 Wend. 389; Welch v. Clark, 12 Vt. 686, 36 Am. Dec. 368; Whitney v. Ladd, 10 Vt. 165; Reed v. Shepardson, 2 Vt. 120, 19 Am. Dec. 697.

[95] Brown v. Lane, 19 Tex. 203; Converse v. McKee, 14 Tex. 30.

[96] Neary v. Cahill, 20 Ill. 214; King v. Manning, Com. Rep. 619; Waddell v. Cook, 2 Hill, 48, 37 Am. Dec. 372.

[97] Vicory v. Strausbaugh, 78 Ky. 425; Willis v. Loeb, 59 Miss. 168; Blumenfield v. Denard, 71 Miss. 842.

Digitized by Google

the duty of the officer must be ascertained from examining the decisions of his own state. The majority of the decisions on this subject are based on the false assumption that a copartnership is a cotenancy; and therefore, sustain the officer in taking exclusive possession of the partnership property under a writ against one member only.[98] The minority, based on more correct perceptions of the nature of a copartnership and the rights of its respective members, will not permit a writ against one member to be used to seize all the assets and to suspend the business of the firm.[99] In several of the states statutes have been enacted which either entirely forbid the taking of possession of partnership property under a writ against one partner, or else limit such possession to the right to take and hold it only for the purpose of making an inventory and appraisement.[100]

Where possession is not allowed to this extent the mode of levying is by garnishing or serving a notice upon the other members of the firm.[101]

[98] Andrews v. Keith, 34 Ala. 722; Harris v. Phillips, 49 Ark. 58; Felt v. Cleghorn, 2 Colo. App. 4; Davis v. White, 1 Houst. 228; Williams v. Lewis, 115 Ind. 45, 7 Am. St. Rep. 403; Lloyd v. Tracy, 53 Mo. App. 175; Roop v. Herron, 15 Neb. 73; James v. Burnet, 20 N. J. L. 635; Clements v. Jessup, 36 N. J. Eq. 569; Nixon v. Nash, 12 Oh. St. 647, 80 Am. Dec. 390; Cogswell v. Willson, 17 Or. 31; Tafford v. Hubbard, 15 R. I. 326; Snell v. Crowe, 3 Utah, 26; Lamoille V. R. Co. v. Bixby, 55 Vt. 235; Graden v. Turner, 15 Wash. 136; Powers v. Large, 69 Wis. 621, 2 Am. St. Rep. 767; Haskins v. Everett, 4 Sneed, 531; Barrett v. McKenzie, 24 Minn. 20; United States v. Williams, 4 McLean, 236; Place v. Sweetzer, 16 Ohio, 142; Stewart v. Moore, 1 Handy, 22; see ante, § 125.

[99] Russell v. Cole, 167 Mass. 6, 57 Am. St. Rep. 432; Richard v. Allen, 117 Pa. St. 226, 2 Am. St. Rep. 652; White v. Rech, 171 Pa. St. 82; Vandike v. Rosskam, 68 Pa. St. 330; see ante, § 125.

[100] Aultman v. Fuller, 53 Ia. 260.

[101] Patterson v. Trumbull, 40 Ga. 104; Anderson v. Chenney, 51 Ia. 372; Middlebrook v. Zapp, 79 Tex. 321.

Digitized by Google

The law with respect to the levy of a writ on a partner's interest in firm property involves many perplexities, the solution of which is worthy of legislative aid. To deny the right to make such a levy may very seriously embarrass creditors of a debtor amply able to discharge their debt, while to admit the right may involve the copartners, and perhaps the creditors, of the firm, in very serious inconvenience and substantial loss. Where the levy is permitted, its ultimate effect is to confer on the purchaser thereunder nothing beyond the right to an accounting. This is all the judgment debtor has, and therefore all he can transfer, whether the transfer be voluntary or involuntary.[102] Specific chattels, constituting a part of the partnership assets, cannot, in several of the states, be seized and sold under a writ against one of the partners.[103] In these states, though it is conceded that an officer may levy a writ against one member of a partnership upon personal property thereof, and may take exclusive possession, it is insisted that, as the partner's interest is only his share of what may remain after selling the assets and satisfying the obligations, an officer has no right to levy upon any specific chattel, but only upon the interest of the defendant in the firm. "That the interest of one partner in the goods or property of the firm may be seized and sold upon execution for his individual debt cannot be doubted; and it is likewise

[102] Barrett v. McKenzie, 24 Minn. 20; Boro v. Harris, 13 Lea, 36; Osborn v. McBride, 16 Nat. Bank. Reg. 22; Bank v. Carrollton R. R., 11 Wall. 624; Deal v. Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Whigham's Appeal, 63 Pa. St. 199; Durburrow's Appeal, 84 Pa. St. 404.

[103] Daniel v. Owens, 70 Ala. 297; Haynes v. Knowles, 36 Mich. 407; Hutchinson v. Dubois, 45 Mich. 143; Levy v. Cowan, 27 La. Ann. 556.

Digitized by Google

settled that, as incidental to the right of sale, the officer may, without interfering with the rights of the other partners, take possession of the interest seized, and deliver it to the purchaser, who takes subject to the rights of the other partners, and to the contingency that an accounting may show that he took no beneficial interest by the purchase. The purchaser cannot acquire specific articles of property at such a sale; but if the creditor of one partner sells his debtor's interest in the firm property, the purchaser may ultimately obtain any surplus that may remain after the firm creditors are paid, and the partnership accounts fully adjusted. Specific articles of property cannot be levied upon and sold to satisfy the individual debt of one partner, and when the officer, instead of selling the whole interest of the execution debtor, sells the whole of certain specified articles of property belonging to a firm, the other owners may treat him as a trespasser, and may enjoin the sale or the delivery of the articles so sold." [104]

In other states the seizure of either a part or the whole of the chattels of a copartnership, under a writ against one of its members, and the exclusion of his copartners from their possession, is unauthorized, and warrants an action of trespass against the officer.[105] But in a majority of the states the right and duty of an officer acting under a writ against a copartner are the same as when acting under a writ against a cotenant. He may seize any of the property in which the defendant has an interest, may retain possession until

[104] Williams v. Lewis, 115 Ind. 45, 7 Am. St. Rep. 403; Gerard v. Bates, 124 Ill. 150, 7 Am. St. Rep. 350; Kunz v. Cox, 113 Mich. 546, 67 Am. St. Rep. 480.

[105] Sanborn v. Royce, 132 Mass. 594; Garvin v. Paul, 47 N. H. 158; Russell v. Cole, 167 Mass. 6, 57 Am. St. Rep. 432; Richard v. Allen, 117 Pa. St. 226, 2 Am. St. Rep. 652; White v. Rech, 171 Pa. St. 82.

Digitized by Google

the sale, and may then deliver possession to the purchaser, who, in a qualified sense, becomes a cotenant with the copartners who were not parties to the writ.[106] Whether the latter are entitled to resume possession, in the event that the property is needed in liquidating the partnership liabilities, or for other partnership purposes, and if so, by what remedies their rights may be enforced, are unsolved judicial problems.

Though by the laws of the state in which the officer is acting he may take exclusive possession of property under a writ against one of its owners, he must confine his levy and sale to the interest of the defendant. If he assumes to levy upon or to sell the whole property, his act, as against the partners or cotenants not named in the writ, is wrongful. They may regard him as a trespasser upon their rights, or as guilty of an unlawful conversion of their property.[107] He may be sued for trespass or conversion, as the injured cotenants may elect. The rule that an officer or an individual who, having the right to sell a moiety of personal

[106] Clark v. Cushing, 52 Cal. 617; Atkins v. Saxton, 77 N. Y. 195; Hershfield v. Claflin, 25 Kan. 166, 37 Am. Rep. 237; Read v. McLanahan, 47 N. Y. Sup. Ct. 275; Fogg v. Lawry, 68 Me. 78, 28 Am. Rep. 19; People's Bank v. Shryock, 48 Md. 427, 30 Am. Rep. 476; Saunders v. Bartlett, 12 Heisk. 316; Wright v. Ward, 65 Cal. 525; Randall v. Johnson, 13 R. I. 338.

[107] Snell v. Crowe, 3 Utah, 26; Atkins v. Saxton, 77 N. Y. 195; Edgar v. Caldwell, Morris, 434; Neary v. Cahill, 20 Ill. 214; Smyth v. Tankersley, 20 Ala. 212, 56 Am. Dec. 193; Fiero v. Betts, 2 Barb. 633; Sheppard v. Shelton, 34 Ala. 652; White v. Morton, 22 Vt. 15, 52 Am. Dec. 75; Walsh v. Adams, 3 Denio, 125; King v. Manning, Com. Rep. 619; Waddell v. Cook, 2 Hill, 48, 37 Am. Dec. 372; Melville v. Brown, 15 Mass. 82; Moulton v. Robinson, 7 Fost. 550; Bates v. James, 3 Duer, 45; Mussey v. Cummings, 34 Me. 74; Frisbee v. Langworthy, 11 Wis. 375; Freeman on Cotenancy and Partition, § 214; Dean v. Whittaker, 1 Car. & P. 347; Pain v. Middlesex, Ryan & M. 99. An officer levying on the interest of a part owner must, in Georgia, specify what the interest is on which he has levied. Simms v. Phillips, 51 Ga. 433.

Digitized by Google

property, sells the whole, becomes thereby guilty of a conversion, and liable in trover for the interest wrongfully sold, is supported by so vast a number of American decisions that we do not expect to see it overthrown in this country. In England the reverse is true. In that country it has recently been settled that the sale of goods by a pledgee is not a conversion of them.[108] If a sale by a pledgee is no conversion, it must follow that a levy and sale under an execution against the pledgee would be none. It has for some time been established in England that a sale of the whole property made by an officer under a writ against a part owner is not a conversion;[109] and that an officer selling the whole, when the defendant held only a moiety, or when the defendant had an estate in possession, while some other person held an estate in reversion, is liable, not for a conversion, but simply for such special injury as can be shown to have been suffered by the cotenant or reversioner not a party to the writ.[110]

§ 255. Levy upon Property on Defendant's Person.— In speaking of what may be distrained for rent, Lord Coke said: "It must be of a thing whereof a valuable property is in somebody, and therefore dogs, bucks, does, conies, and the like, that are ferae naturae, can-

[108] Donald v. Suckling, L. R. 1 Q. B. 585; Halliday v. Holgate, L. R. 3 Ex. 299. In the United States, an officer is liable for selling the whole property under execution against a pledgor. Wheeler v. McFarland, 10 Wend. 318.

[109] Farrar v. Beswick, 1 Mees. & W. 682; 1 Tyrw. & G. 1053; 5 L. J. Ex., N. S., 225; Mayhew v. Herrick, 18 Jur. 1078; 7 Com. B. 229; 18 L. J. C. P. 179.

[110] See preceding citation; also Bradley v. Copley, 1 Com. B. 685; Tancred v. Allgood, 4 Hurl. & N. 438; 28 L. J. Ex. 362; Lancashire W. C. v. Fitzhugh, 6 Hurl. & N. 502; 30 L. J. Ex. 231; 3 L. T., N. S., 703; Jenkins v. Cooke, 1 Ad. & E. 372.

Digitized by Google

not be distreyned. Although it may be of valuable propertie, as a horse, etc., yet when a man or woman is riding on him, or an axe in a man's hands cutting of wood, and the like, they are for that time privileged, and cannot be distreined." [111] To this the annotator has added in a note the statement that "if ferrets and nets in a warren be taken damage-feasant, it is good. But if they are in the hands of a man, they cannot be distrained any more than a horse on which a man is; nor can they be distrained if they are out of the warren." [112] There are several English authorities in consonance with the doctrine we have stated.[113] It is probably true that this law, providing that certain things, when in actual use, cannot be distrained, is equally applicable to levies made under execution. There might be some doubt from the early cases whether the exemption is to be attributed to the nature of the property or its use, or to the fact of its being upon the person or in the hands of its owner. Hence, while it was conceded that wearing apparel upon the person of the defendant could not be taken in execution, it was doubtful whether the same apparel could not be levied upon when not in actual use. The later cases appear to settle upon the theory that property upon a debtor's person or in his hands cannot be seized, because such seizure is liable to provoke a breach of the peace.[114] The American cases upon this subject are very few. In California, a defendant had

[111] Co. Lit. 47 a.

[112] Ibid.

[113] Gorton v. Falkner, 4 Term Rep. 565; Storey v. Robinson, 6 Term Rep. 139; Sunbolf v. Alford, 3 Mees. & W. 253; Simpson v. Hartopp. Willes, 513.

[114] Field v. Adames, 12 Ad. & E. 649; Mack v. Parks, 8 Gray, 517, 69 Am. Dec. 267.

Digitized by Google

a bag of gold in his hand, when the same was taken from him by an officer. The propriety of this seizure being subsequently questioned, the supreme court said: "The coin was contained in a bag, which was held by the plaintiff in his hand, and from its seizure thus situated the plaintiff could not claim any exemption, as he might perhaps do in reference to money upon his person. Thus situated, it was like a horse held by its bridle, subject to seizure under execution against its owner."[115] In Massachusetts a defendant had on his person a watch. The officer asked to see the watch. When it was handed to him for inspection he broke the cord by which the watch was attached to the defendant's person, and thereafter levied upon the watch under a writ against its owner. The supreme court of the state treated this act of severance as entirely unjustifiable. Being initiated by a wrongful act, the levy was adjudged to be invalid, and the officer was declared to be a trespasser ab initio.[116] This case probably establishes in America the doctrine that property upon the person of a defendant cannot be seized under execution. But it would seem, from the California case of Green against Palmer,[117] that this rule does not extend to property which the debtor may be holding in his hand. The only ground upon which this exemption from levy can be justified is that otherwise the officer would be authorized to commit a trespass upon the person of the defendant, and thereby to provoke

[115] Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492.

[116] Mack v. Parks, 8 Gray, 517, 69 Am. Dec. 267.

[117] 15 Cal. 411. In North Carolina, a horse on which the defendant is riding may be levied upon, and the courts doubt the applicability of the English law of distraining to the American law of levies under execution. State v. Dilliard, 3 Ired. 102, 38 Am. Dec. 708.

Digitized by Google

a breach of the peace. We are unable to understand why this reason does not apply to a thing held in the defendant's hand, or to a horse on which he is riding, as well as to a watch attached to his neck by a cord. With respect to property upon the person of the defendant, its exemption from levy while so situated is founded upon the danger that the power to seize and search the person of a defendant, while acting under civil process, might be grossly abused. Hence, it has been held that an article of personal ornament cannot, under a writ of replevin, be taken from the person of a defendant without his assent. The exercise of such a power is not only contrary to right and unsupported by authority, but it is also inconsistent with sound policy. Practical jurisprudence looks, in the application of remedies, to the peace, good order, and decorum of society. The evils which would flow from the unrestricted use of a civil process to search the person, and to seize from it articles of dress or use or ornament, are obvious and manifold. It would bring the officer of law in direct contact with the citizen, under circumstances well calculated to excite irritation and anger, and lead directly to breaches of the peace. It would place in the hands of wicked and evil-disposed persons the means of annoyance and injury, and the power to interfere wantonly and without just cause with the most sacred rights of the person. If the right exists at all, it cannot be limited to particular articles of use or adornment, but must extend to every article of apparel worn by persons of either sex, and might be lawfully exercised at the sacrifice of decency and the proprieties of life.[118]

[118] Maxham v. Day, 16 Gray, 219.

Digitized by Google

§ 256. Of the Right to Enter Upon the Premises of the Defendant or Another to Make a Levy.—With the exceptions hereinafter stated, an officer charged with the duty of levying a writ may go wheresoever it is necessary to accomplish his purpose, and the creditor may attend him to point out property to be seized and to otherwise assist him in making the levy. Both may, therefore, enter upon the premises either of the defendant in execution or of a third person, if necessary for the purpose of making a levy.[119]

Where, however, his entry is made upon the premises of a stranger to the writ, a necessity must exist therefor. If there is no property of the defendant there, the entry is not justified, and the sheriff, in making it, must be regarded as a trespasser.[120]

The entry upon the premises, even of the defendant in execution, should be without any unnecessary invasion or disturbance of his rights. Hence the officer has no right to exclude him from the possession of any part of the premises, or to otherwise take exclusive possession thereof.[121] This rule applies to levy upon goods in a store. They should be removed within a reasonable time, instead of taking possession of the store, and excluding the owner therefrom.[122]

The common-law principle, that every man's house is to be treated as his castle, and is to be kept sacred from forcible intrusion, interposes a serious, and sometimes an insurmountable, obstacle to the service of

[119] McGee v. Given, 4 Blackf. 16; Parham v. Thompson, 2 J. J. Marsh. 159; Thompson v. Craigmyle, 4 B. Mon. 391, 41 Am. Dec. 240.

[120] McGee v. Given, 4 Blackf. 16.

[121] Bayne v. Patterson, 40 Mich. 658.

[122] Holland v. Anthony, 19 R. I. 216.

Digitized by Google

process in civil cases. It seems to be perfectly clear that a debtor may protect his own property from levy by placing it within his dwelling-house and keeping the outer doors closed. An officer who has without force obtained admission to the house may go from room to room, or may forcibly enter any inner room, or break open trunks, chests, and wardrobes for the purpose of making a necessary levy.[123] But the outer

[123] Lee v. Gansel, Cowp. 1; Hutchinson v. Birch, 4 Taunt. 619; Williams v. Spencer, 5 Johns. 352; State v. Thackam, 1 Bay, 358; Impey on Sheriffs, 120; Prettyman v. Dean, 2 Harr. (Del.) 494. In Cantrell v. Connor, 6 Daly, 39, it was held that where a building was occupied by several tenants, and had an outer door through which all of them passed to gain admittance to their several apartments, that an officer who had peaceably entered this outer door might forcibly enter any of the others. Precisely the contrary is affirmed by Swain v. Mizner, 8 Gray, 182, 69 Am. Dec. 244, in which case the court said: "But upon the facts disclosed in the bill of exceptions, we think that the portion of the building occupied by the plaintiff, distinct from the hall, entry, and stairway leading to it, did constitute what must be considered in law his dwelling-house. The whole structure appears never to have been designed as a tenement for a single family, but was so constructed as to afford separate and distinct habitations for several persons. Thus the plaintiff occupied all the rooms on one floor of the building, and the hall or entry through which he passed to reach either of the doors opening into any of the apartments occupied by him was used as a common passage-way for all the tenants of the several portions of it. It would seem to make no difference, whatever may be the character or peculiarity of the common passage by which access to a dwelling is attained, whether it is a public or a private way; or whether it leads from one street to another, or only into a place or court to which there is but a single entrance; or whether it is an open street or a way inclosed by buildings and covered with a roof. In the present instance the hall, entry, and stairway served as a common and public passage-way for many occupants of entirely distinct habitations. All the right to which the plaintiff or any other of the tenants of the different parts of the building in this common passage-way was entitled was the right of using it for that purpose in the enjoyment of the tenements which they severally possessed. The apartments occupied by the plaintiff constituted, in and of themselves, a complete habitation for himself and his family. He had the sole and exclusive use and possession

Digitized by Google

door is more sacred. No officer has authority to force

of them as completely as if they stood separate and apart from everything else, and were in any other distinct structure. The privilege which the law allows to a man's habitation clearly ought to be attached to apartments so situated. It arises from the great regard which the law has for every man's safety and quiet; and therefore it protects him from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect: Bac. Abr., tit. Sheriff, note 3. And this reason shows that the principle of law which gives protection to dwelling-houses has no reference whatever to their quality, construction, or magnitude, but is solely for the purpose of insuring the quiet, convenience, and security of those who inhabit and dwell in them. Domestic security and peace would be equally disturbed by violence in breaking the doors and forcing an entrance into a dwelling-house, whether it should consist of the entire portions of a building or of separate and distinct apartments within it. Nor can the fact that there were several doors leading from the common passage-way into the different apartments occupied by the plaintiff lead to a different conclusion. For although it was said by Lord Mansfield, in Lee v. Gansel, Cowp. 1, that the having of four outer doors would lead to the grossest absurdity, since the greatest house in London has but one, that is not the manner in which, according to our prevailing habits and modes of living, our dwelling-houses are here constructed. Many might undoubtedly be found here having four, and it would perhaps be difficult to find a house of any moderate degree of pretension which has less than two outer doors. While all the doors opening into any of the apartments occupied by the plaintiff are closed, each of them may be considered, and must be treated, as an outer door. They are all necessary to protect the habitation from intrusion of those who have no license to enter it. Whether an officer, who had lawfully passed through one of them, might afterward, for the purpose of completing his service of process, treat the others as inner doors, need not now be considered, because no such question arises upon the facts reported. The complaint against the defendant is confined to the breaking open of one of the doors before he had obtained an entrance into any part of that portion of the building which was in exclusive occupation of the plaintiff. The defendant contends that the door constructed and used for closing the entrance from the street or public highway into the common hall or entry of the building is to be considered the only outer door of the plaintiff's dwelling-house; that is to say, that his house consisted of the apartments occupied by him and of the hall and entry used by him as a passage-way in common with the tenants of all the other parts of the building.

Digitized by Google

it. He must wait until opportunity occurs for a peaceful entry, free from the aid of force or violence.[124]

It is not necessary, in order to entitle the defendant to protect his dwelling from intrusion, that the door be either shut or locked, if he, being present, shows a desire to exclude the officer by closing the door against him. The latter may come upon him so suddenly as to prevent his fastening or entirely closing the door; but if he be attempting to close it, the officer may not lawfully resist. "A man's house is deemed his castle for safety and repose to himself and family; but the protection and repose would be illusive and imperfect if a man were deprived of the right of shutting his own door when he sees an officer approaching to execute civil process. If the officer cannot enter peaceably before the door is shut, he ought not to attempt it, for this unavoidably engenders a breach of the peace, and is as much a violation of the owner's right as if he had broken the door at first." [125] A building may be occupied partly as a dwelling and partly for business purposes, as where the occupant conducts a store for the sale of merchandise in a room fitted up for that

But this latter fact is by no means shown. On the contrary, these appear to have constituted no part of his tenement. He had an easement in them only in common with others, who all equally enjoyed the like privilege for the purpose of gaining access to their respective tenements."

[124] Semayne's Case, 5 Coke, 91; Boggs v. Vandyke, 3 Harr. (Del) 288; note to McGee v. Given, 4 Blackf. 18; Keith v. Johnson, 1 Dana, 605, 25 Am. Dec. 167; Heminway v. Saxton, 3 Mass. 222; Widgery v. Haskell, 5 Mass. 155, 4 Am. Dec. 41; State v. Hooker, 17 Vt. 658; Hooker v. Smith, 19 Vt. 151, 47 Am. Dec. 679; Kerbey v. Denby, 1 Mees. & W. 336; Tyrw. & G. 688; People v. Hubbard, 24 Wend. 369; Calvert v. Stone, 10 B. Mon. 152; Snydacker v. Brosse, 51 Ill. 357, 99 Am. Dec. 551; Swain v. Mizner, 18 Gray, 182, 69 Am. Dec. 244; State v. Whittaker, 107 N. C. 802.

[125] State v. Armfield, 2 Hawks, 246, 11 Am. Dec. 762.

Digitized by Google

purpose, and resides with his family in other parts of the building. In such cases the whole building is not regarded as a dwelling; and even though the two parts are approached through a common door, this door may be broken for the purpose of seizing goods in the store.[126] If, however, the building or room is used as a dwelling, the owner's right to shelter himself and his goods therein from civil process, in the part used as such dwelling, is not forfeited by his also using it for business purposes. Hence a levy effected by breaking into a building consisting of one room, in which the defendant resided and also carried on her business as a milliner, was adjudged to be a trespass, and the officer was not permitted, in mitigation of damages, to prove that the goods levied upon had been sold, and the proceeds applied to the satisfaction of a judgment against the defendant.[127]

It was always conceded that an officer forcing or opening the outer door of a dwelling to make a levy was liable as a trespasser. But the effect of a levy thus made in violation of the law is still unsettled. "The English books of practice abound with the distinction that though the sheriff, having a fieri facias, be a trespasser in breaking the outer door of the debtor's house, yet, when he is once in the house, though he illegally entered, and for the purpose of taking the debtor's goods, and though he would be liable for an action of trespass for the entry, yet the levy is lawful." [128] This distinction is supported by early English dicta; but whether it is now a part of the law of that

[126] Stearns v. Vincent, 50 Mich. 209, 45 Am. Rep. 37.

[127] Welsh v. Wilson, 34 Minn. 92.

[128] People v. Hubbard, 24 Wend. 370, 35 Am. Dec. 628; Impey on Sheriffs. 120; Year Book, 18, E, 4, fol. 4, pl. 19; Semayne's Case, 5 Coke, 93.

Digitized by Google

country admits of serious doubt.[129] In the United States it has been received with no favor. Our courts have been loath to concede validity to an act done in defiance of law. After the most careful consideration, they have determined that a levy initiated by an unlawful entry of the debtor's dwelling is void,[130] and that the removal of the goods may lawfully be resisted by the defendant or by his guest who may happen to be present in the defendant's absence. Nor is it essential to show that the outer door was fastened in such a manner as to require force to open it. It is sufficient that the door was closed. The officer has no right to lift the latch. Any entrance which would be sufficient to sustain a conviction against a burglar who had entered and stolen goods is sufficient to render an officer guilty of trespass, where his entry was for the purpose of levying an execution.[131] "The privilege which the law allows to a man's habitation, and which precludes the sheriff from entering, unless the outer door be open, either to arrest the party or to take his goods on execution, does not extend to a store or barn disconnected from the dwelling-house, and forming no part of the curtilage." [132]

[129] Ryan v. Shilcock, 7 Ex. 72; Hooper v. Lane, 6 H. L. Cas. 443. But an arrest after breaking doors is conceded to entitle defendant to be released. Hodgson v. Towning, 1 W. W. & D. 53.

[130] Ilsley v. Nichols, 12 Pick. 270, 22 Am. Dec. 425; People v. Hubbard, 24 Wend. 369, 35 Am. Dec. 628; Curtis v. Hubbard, 1 Hill, 336, and 4 Hill, 437, 40 Am. Dec. 292; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459; Bailey v. Wright, 39 Mich. 96.

[131] Curtis v. Hubbard, 1 Hill, 336; Nash v. Lucas, L. R. 2 Q. B. 590; Buckenham v. Francis, 11 Moore, 40; Welsh v. Wilson, 34 Minn. 92; contra, Ryan v. Shilcock, 7 Ex. 72; 21 L. J. Ex. 55; Tutton v. Darke, 5 Hurl. & N. 647.

[132] Haggerty v. Wilber, 16 Johns. 288, 8 Am. Dec. 321; Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145; Penton v. Browne, 1 Sid. 186; McGee v. Given, 4 Blackf. 18; Stearns v. Vincent, 50 Mich. 209, 45 Am. Rep. 37.

Digitized by Google

It has always been claimed that the refusal of the law to permit an officer to break into the debtor's dwelling to levy an execution arises not from its wish to shield the property, but solely because of its desire to preserve the sanctity of the dwelling. If this claim is well founded, we should suppose that the dwelling would be equally preserved from intrusion when the writ is against a stranger, as well as when against the owner. But this supposition is not supported by the authorities. An officer may enter the house of A for the purpose of levying upon B's goods which are therein. A forcible entry must not be made until a demand to open the doors has been met with a refusal to comply.[133] And the right to enter depends on the fact of B's goods being in the house. If they are not there, the officer cannot justify his entry. He is a trespasser.[134] When the officer has once lawfully entered the outer door, the sanctity of the dwelling, as regards that writ under which the entry was made, is destroyed. The door cannot now be closed upon him. If necessary, he may break it open to get out of the house with the goods,[135] and, if necessary to complete his levy, he may forcibly return, breaking open the outer door, if it should be found fastened.[136]

§ 257. Demand Preceding the Levy.—In a majority of the states an officer may proceed to levy an execu-

[133] Impey on Sheriffs, 120; Douglass v. State, 6 Yerg. 525; Stitt v. Wilson, 1 Wright, 505; Keith v. Johnson, 1 Dana, 605, 25 Am. Dec. 167; De Graffenreid v. Mitchell, 3 McCord, 506, 15 Am. Dec. 648; Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

[134] Johnson v. Leigh, 1 Marsh. 565; Morrish v. Murrey, 13 Mees. & W. 52; Ratcliff v. Burton, 3 Bos. & P. 229.

[135] Pugh v. Griffith, 7 Ad. & E. 827.

[136] Aga Kurboolie Mahomed v. The Queen, 4 Moore P. C. C. 239; Glover v. Whittenhall, 6 Hill, 597; Saunders v. Milward, 4 Harr. (Del.) 246.

Digitized by Google

tion without making any demand on the defendant for payment and without informing him that he has any writ in his hands. It may sometimes happen that this rule works with needless harshness. The debtor may be able and willing to pay. If so, it is unjust to vex him with the expense and annoyance of a levy. On the other hand, he may be able but not willing to make payment. If so, a notice that the writ was in the hands of the officer might give the defendant a sufficient opportunity to transfer or conceal his effects, and thus defeat the satisfaction of the writ. Hence the best rule upon this subject is one which leaves it to the officer to judge whether the defendant may with safety be informed of the impending levy, and given an opportunity to avert it by payment. In some of the states a demand for payment must precede the levy,[137] and must be made on each defendant before his property is seized.[138] In other states the debtor must be notified of the levy and of the time fixed for the sale.[139] In Missouri this notice need not be given, except where a writ is sent to be levied in another county from that in which the judgment was entered.[140]

The failure of an officer to notify the defendant of the execution and to demand payment thereof before a levy is a mere irregularity. If the defendant shows

[137] People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418; White v. Farley, 81 Ala. 563; Davis v. Chicago D. Co., 129 Ill. 180; Boggess v. Pennell, 46 Ill. App. 150; Morrissey v. Feeley, 36 Ill. App. 556; Terrill v. State, 66 Ind. 570; Guerin v. Kraner, 97 Ind. 533; Collins v. Perkins, 31 Vt. 624.

[138] Dutton v. Tracy, 4 Conn. 368.

[139] Helms v. Alexander, 10 Humph. 44; Schultz v. Elliott, 11 Humph. 183; Lafferty v. Conn, 3 Sneed, 221; Hinson v. Hinson, 5 Sneed, 322, 73 Am. Dec. 129; Jenson v. Woodbury, 16 Iowa, 515.

[140] Harrison v. Cachelin, 35 Mo. 79; Harris v. Choteau, 37 Mo. 165; Harper v. Hopper, 42 Mo. 124; Buchanan v. Atchison, 39 Mo. 503.

Digitized by Google

that, by reason of this failure, he has been in some way damaged, he is doubtless entitled to relief, if he acts promptly after knowledge of the facts. If his property should be sold because of his ignorance of the levy and his consequent failure to pay the judgment, or to select what he was entitled to hold as exempt, the sale might be set aside in some appropriate proceeding.[141]

A levy, however, without this precedent demand, though required by statute, is not invalid or void. A sale thereunder cannot be avoided by a collateral attack thereon, nor, as a general rule, will any relief be granted to the defendant where he does not appear to have been in any way prejudiced by the omission of the officer.[142]

§ 258. Of the Defendant's Right to Select the Property to be Levied.—Upon common-law principles, the debtor has no right to select the property upon which the levy is to be made. The sheriff must proceed to execute the writ without listening to the suggestions of the defendant. At all events, he would be liable for all loss resulting to plaintiff from permitting the defendant to control the levy.[143] But there are many instances in which a levy may be made upon property amply sufficient to satisfy the writ without seriously embarrassing defendant's business; but the officer, electing to leave this property untouched, may seize upon other property of no greater value in the market, but indispensable to the continuance of defendant's

[141] Hobson v. McCambridge, 130 Ill. 367.

[142] White v. Farley, 81 Ala. 563; Love v. Powell, 5 Ala. 58; Solomon v. Peters, 37 Ga. 251, 92 Am. Dec. 69; Gardner v. Eberhart, 82 Ill. 316; Roch v. Haas, 110 Ill. 528; Guerin v. Kraner, 97 Ind. 533; Collins v. Perkins, 31 Vt. 624.

[143] Bodley v. Downing, 4 Litt. 28.

Digitized by Google

business, or otherwise of the most vital importance to him. In such cases, in order that an oppressive use of the writ may not be made, the defendant ought to be permitted to select which property shall be taken to satisfy the writ. This privilege of selection is now given by statute in many of the states, and an officer has no more right to deny it than he has to make an excessive levy, or otherwise to pervert his writ from an instrument of justice to an instrument of oppression.[144] After once exercising his right of selection and turning over property to the sheriff to be levied upon, the defendant appears to have no right to reconsider the question and to insist upon the restoration to him of the property first selected on his substituting other property therefor.[145]

But the privilege of selection must be confined within such limits as a due regard for the rights of the plaintiff and the objects of the writ prescribe. If the debtor is absent, the officer need not hunt him up nor wait for his return.[146] A levy must be made. The right of selection may be exercised afterward if the debtor claims it within a reasonable time. Sometimes the plaintiff agrees to enforce the collection of his debt in a certain manner or from certain property. Such an agreement will be enforced by the courts.[147]

If an officer should give the defendant no opportunity to exercise his right of selection, or should deny

[144] Ashby v. Dillon, 19 Mo. 619; State v. Willis, 88 Ind. 118; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Thompson v. Mitchell, 73 Ga. 127; Benson v. Dyer, 69 Ga. 190; Beck v. Avondino, 82 Tex. 314.

[145] Larsen v. Laird, 36 Ill. App. 402.

[146] Cook v. De la Gaza, 13 Tex. 431; People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418.

[147] Irwin v. Shoemaker, 8 Watts & S. 75.

Digitized by Google

such right when claimed, this would undoubtedly entitle the defendant to relief in any appropriate action or proceeding instituted for that purpose; and, perhaps, in a contest between him and the officer the acts of the latter might so savor of malice and oppression as to cause him to be deprived of the protection of his process, and denounced as a trespasser ab initio. However this may be, we apprehend that the levy, unless annulled by some direct action of the defendant, is valid; that it is not subject to any collateral assault; and that it will therefore sustain a sale, of which, through the defendant's inaction, it has become a necessary support.[148] Probably the only remedy available to a defendant who is refused the right to select property to be levied upon is an action for the damages suffered by him thereby.[149] Such an action may be maintained against the plaintiff, if it was through his instrumentality that the right of selection was denied. In so determining, the supreme court of Texas said: "The statute that accords to the defendant the privilege of pointing out property to be levied on is held to be directory, and the courts have refused to disturb sales under executions when the defendant, for want of opportunity, has been denied this right. But when the defendant promptly avails himself of his privilege under this statute, and actually points out property to be levied on subject to execution and sufficient in value to make the debt, his right, so asserted, cannot be ignored by the parties that levy the writ except at their peril, either to have the sale set aside or to subject themselves to a judgment for damages, or both." [150]

[148] Frink v. Roe, 70 Cal. 296; Barfield v. Barfield, 77 Ga. 83; Tillotson v. Doe, 5 Blackf. 590; Cavender v. Smith, 1 Ia. 306.

[149] Barfield v. Barfield, 77 Ga. 83.

[150] Beck v. Avondino, 82 Tex. 314.

Digitized by Google

§ 259. Levy upon Property of Sureties.—In some of the states, where a judgment is against two or more defendants, one of whom was a surety or indorser of the others, this surety has the right to require the officer to first levy upon the property of the principal debtor or debtors.[151] But in order to protect his own property from seizure, the surety must point out and identify the property of the principal liable to execution.[152] If, from any reason, the property of the principal is not immediately available under the writ, or if it is not sufficient to satisfy the judgment, the property of the surety may be taken.[153] But, as a general rule, officers charged with the execution of a writ are not required to investigate and determine the respective equities of the different defendants as against one another, and may therefore levy upon the property of either without inquiring whether he was principal or surety in the liability which has merged in the judgment.[154] While the plaintiff is at liberty to levy on the property of a surety as well as of the principal debtor, yet if he once makes a levy on the property of the latter, he cannot release it to the prejudice of the surety. If he does so, the surety is released from liability at least to the extent of the injury sustained by him. The law upon this subject has been thus stated by the supreme judicial court of Maine: "Although the plaintiff was not legally bound

[151] Hamblin v. Foster, 4 Smedes & M. 139; Atkinson v. Rhea, 7 Humph. 59; Kelso v. Pratt, 26 Tex. 381; Cheatham v. Brien, 3 Head, 552.

[152] Gibson v. Hughes, 6 How. (Miss.) 315.

[153] Cheatham v. Brien, 3 Head, 552; Walker v. Gilbert, 13 S. & M. 693.

[154] Warren v. Edgerton, 22 Vt. 199, 54 Am. Dec. 66; Eason v. Petway, 1 Dev. & B. 44; Boughton v. Bank, 2 Barb. Ch. 458; Manry v. Shepard, 57 Ga. 68; Steele v. Atlanta L. I. Co., 91 Ga. 64; Fuller v. Loring, 42 Me. 481; Knight v. Charter, 22 W. Va. 422.

Digitized by Google

to use active diligence in collecting the debt of the principal, and the surety would not be discharged by reason of his delay in his matter, and though the plaintiff might have discontinued proceedings against the principal debtor, which he need not have instituted, yet it would be clearly inequitable to allow him to abandon an absolute lien or security upon the property of the principal, which he had obtained as the result of those proceedings, and to retain his hold upon the security for the whole debt." [155]

Where the sheriff is required by law to levy first upon the property of the principal, and he, contrary to law, levies on the goods of a surety, the latter may, by motion to the court, compel the release of the levy by showing that the principal has sufficient property available for the satisfaction of the writ.[156] Where the judgment is against the defendants jointly, without showing that one is the surety of the other, the plaintiff may, in Mississippi, proceed to levy on the property of the surety before showing that the principal is irresponsible.[157] A levy on the property of the surety before that of the principal debtor is not void. No one but the surety can complain of it. He may have it vacated, or may sustain an action against the officer for damages.[158]

§ 260. What Acts Constitute a Valid Levy.—We may be led more easily to understand the acts essential to

[155] Springer v. Toothaker, 43 Me. 381, 69 Am. Dec. 66; Baird v. Rice, 1 Call. 18; Bartlett's Ex. v. Winstons, 1 Munf. 269; Knight v. Charter, 22 W. Va. 428.

[156] Moss v. Agricultural Bank, 4 Smedes & M. 726.

[157] Work v. Harper, 31 Miss. 107, 66 Am. Dec. 549; Walker v. Gilbert, 18 Smedes & M. 693.

[158] Atkinson v. Rhea, 7 Humph. 59; Hyman v. Seaman, 33 Miss. 185; Doe v. Pritchard, 11 Smedes & M. 327.

Digitized by Google

a levy upon property, whether real or personal, by considering the purpose of the levy and the place which it naturally occupies in proceedings to subject property to execution. Where the common-law rules still prevail, the writ, as soon as issued, binds personal property, as its lien operates as such from the time of its delivery to the proper officer for the purpose of coercing payment of the judgment recited therein. This lien does not apply to any particular parcel of property, but extends to all property of the debtor subject to execution, and hence it often includes more property than is essential to the satisfaction of the judgment. The duty of the officer, on the receipt of the writ, is to perform such act or acts as may be necessary to apprise all interested persons that a specific part of the debtor's property is subject to execution. This duty exists whether the writ is a lien or not, and, until its performance, the officer acquires no right to the possession or control of the property, and can maintain no action for its recovery.[159] The act of thus designating the property against which the officer is about to proceed, and, if necessary, to subject it to sale under his writ, is called a levy.[160] It is not presumed to have been done merely from the fact that the officer has had a writ in his hands under which he ought to have made a levy.[161] The service of the writ is sometimes spoken of, and this word is often used as synonymous with levy. Where, however, the statute requires the officer to read or exhibit his writ, or to make any demand for payment, the

[159] Persels v. McConnell, 16 Ill. App. 526; Mulheisen v. Lane, 82 Ill. 117; Wright v. Morley, 150 Mass. 513; Abeel v. Anderson, 39 Hun, 514.

[160] Burkett v. Clark, 46 Neb. 466; Lloyd v. Wykoff, 11 N. J. L. 218.

[161] Walker v. Henry, 85 N. Y. 180.

Digitized by Google

word "service" is understood to apply to these preliminary acts which, in order of time, necessarily precede the levy.[162]

In determining whether a given state of facts establishes a valid levy, we must consider: 1. The statute of the particular state in which the levy is drawn in question; 2. The person against whose rights the levy is sought to be asserted; and 3. The character of the property upon which the levy was attempted to be made. We shall not here undertake any compilation of the statutes of the various states upon this subject; but shall consider it chiefly in connection with decisions professing to expound the principles of the common law. When the person against whom the levy is sought to be asserted is a vendee or creditor of the defendant in execution, the various acts essential to a valid levy must be proved with greater strictness than when the interests of the defendant are in question. We shall, therefore, first endeavor to show what the officer must do to make a valid levy as against such vendee or creditor. In all cases, there must be something more than a mere pen and ink levy.[163] It is not sufficient that the officer merely makes an inventory of the property and indorses the levy upon his writ. He must go where the property is. He must have it within his view.[164] This rule has been frequently applied to

[162] Terrell v. State, 66 Ind. 570.

[163] Techmeyer v. Waltz, 49 Iowa, 645; Cobb v. Cage, 7 Ala. 619; Chittenden v. Rogers, 42 Ill. 100; Conniff v. Cook, 95 Ga. 61, 51 Am. St. Rep. 55; Persels v. McConnell, 16 Ill. App. 526; Mulhelsen v. Lane, 82 Ill. 117; Rix v. Silknitter, 57 Ia. 262; Crisfield v. Neal, 36 Kan. 278; Wright v. Morley, 150 Mass. 513; Quackenbush v. Henry, 42 Mich. 75; Murphy v. Swadener, 33 Oh. St. 85; Keniston v. Stevens, 66 Vt. 351.

[164] Minturn v. Stryker, 1 Edm. Select Cases, 356; Duncan's Appeal, 37 Pa. St. 500; Wood v. Vanarsdale, 3 Rawle, 401; Lowry v.

Digitized by Google

cases in which officers have gone to factories, stores, and other buildings, and, not being able to gain admission, have proclaimed a levy on the contents of the building and done whatever acts they could for the purpose of perfecting a levy without having obtained admittance to the building or a view of its contents. In all such cases it has been held that the officer did not have the view or control of the property essential to a valid levy thereon.[165] It is not material that the officer keeps close watch over the building and its contents, so that no interference therewith can take place without his knowledge, if he is denied admission, and does not reduce the property sought to be levied upon to his possession or view. A constable seeking to make a levy on the goods in a store went thereto after midnight, but was refused the use of the key, and stationed himself near the store and proclaimed that he had levied on the goods therein, and that he would break and enter the store in the morning. These acts, it was held, did not constitute a sufficient levy as against another officer charged with the service of another writ. The court said: "The custody of the property in such a case must be an actual possession; there must be an actual control with power of removal. It is not sufficient for the officer to take a constructive possession, or to declare that he has taken possession and levied upon the goods, when in fact they are in a locked storehouse, to which another holds the key, and into

Conlter, 9 Pa. St. 349; Cawthorn v. McCraw, 9 Ala. 519; Herron v. Hughes, 25 Cal. 556; Artisans' Bank v. Treadwell, 34 Barb. 553; Linton v. Ford, 46 Pa. St. 294; Carey v. Bright, 58 Pa. St. 70; Brown v. Pratt, 4 Wis. 513, 65 Am. Dec. 330; Taffts v. Manlove, 14 Cal. 49, 73 Am. Dec. 610; Horsey v. Knowles, 74 Md. 602.

[165] Taffts v. Manlove, 14 Cal. 47, 73 Am. Dec. 610; Nelson v. Van Gazelle etc. Co., 45 N. J. Eq. 594.

Digitized by Google

which the officer has not effected an entrance, so that he can see the goods, and ascertain their kind and quantity." [166]

[166] Meyer v. Missouri G. Co., 65 Ark. 286, 67 Am. St. Rep. 927; Hibbard v. Zenor, 75 Ia. 471, 9 Am. St. Rep. 497. The facts in this case were very similar to those involved in the Arkansas case just cited, and the instructions of the trial court were in favor of sustaining the levy. In reversing the judgment, the supreme court said: "The general verdict does not necessarily imply a finding in favor of the defendant on either of these questions. Neither are they determined by the special findings. The general verdict may have been based upon a finding that the levy was complete before the information with reference to the mortgage was imparted to the defendant. On that question the court gave the following instruction: 'To constitute a good levy upon personal property, the officer must have such property within his dominion and control, and must, within a reasonable time, reduce the same to actual possession. If you find that the defendant, having in his possession the writs in question, went to the store of Hall & Co. for the purpose of levying them upon the goods kept in said store, and, on attempting to enter, found the building locked, and thereupon, in pursuance of his intention to make such levy, placed a guard on such premises to maintain and protect his possession and dominion over the property, while he himself went for a key with which to effect an entrance, and within a reasonable time returned and unlocked or broke open the building, and took actual possession of the goods. such acts would constitute a good and sufficient levy from the time he first went upon the premises with intent to make the same.' In our opinion, this instruction cannot be sustained. It holds, in effect, that if the defendant, when he placed the guard on the premises, intended to maintain possession and dominion over the property, and thereafter, within a reasonable time, effected an entrance and actual seizure of the goods, the levy is to be regarded as complete from the time he first attempted to enter the building. But whether a levy was accomplished depends upon the effect of what was done, rather than upon the intent with which it was done. To constitute a levy, the sheriff must, if the property is capable of manual delivery, take actual possession of it. Code, § 2967. He must do that which would amount to a change of possession, or which would be equivalent to a claim of dominion, coupled with a power to exercise it. Crawford v. Newell, 23 Ia. 453; Bickler v. Kendall, 66 Id. 703. Now, while the act of placing the guard on the premises may have amounted to a claim of dominion over the property, it did not necessarily carry with it the power to exercise that dominion; for it did not necessarily have the effect to ex-

Digitized by Google

The property sought to be levied upon must be where he can exercise control over it.[167] And he must exercise, or assume to exercise, dominion, by virtue of his writ. He must do some act by reason of which he could be successfully prosecuted as a trespasser if it were not for the protection afforded him by the writ.[168] But in order to make him responsible as a trespasser, it is not essential that he should remove the property, nor that he should touch it. It is enough that, having the property within his view, and where he can control

clude the owners from the building, or prevent them from assuming the control and care of the property; and they were not necessarily deprived of possession by it. We do not hold that an actual seizure of the goods, or even an entry into the building, was essential to the accomplishment of the levy. But it was not accomplished until defendant had done some act with reference to the property sought to be seized which would, but for the writ, have amounted to a trespass; and the levy would be valid and operative from that time only. And it would not operate by relation, as the instruction holds, from the time the prior steps were taken."

[167] Minturn v. Stryker, 1 Edm. Select Cases, 356; Duncan's Appeal, 37 Pa. St. 500; Wood v. Vanarsdale, 3 Rawle, 401; Lowry v. Coulter, 9 Pa. St. 349; Cawthorn v. McCraw, 9 Ala. 519; Herron v. Hughes, 25 Cal. 556; Artisans' Bank v. Treadwell, 34 Barb. 553; Linton v. Ford, 46 Pa. St. 294; Carey v. Bright, 58 Pa. St. 70; Brown v. Pratt, 4 Wis. 513, 65 Am. Dec. 320; Taffts v. Manlove, 14 Cal. 49, 73 Am. Dec. 610; Meyer v. Missouri G. Co., 65 Ark. 286, 67 Am. St. Rep. 927; Jones v. Howard, 99 Ga. 451, 59 Am. St. Rep. 231; Perry v. Hardison, 99 N. C. 21.

[168] Goode v. Longmire, 35 Ala. 668, 76 Am. Dec. 309; Westervelt v. Pinckney, 14 Wend. 123, 28 Am. Dec. 516; Minor v. Herriford, 25 Ill. 344; Beekman v. Lansing, 3 Wend. 450, 20 Am. Dec. 707; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206; Bryan v. Bridge, 6 Tex. 141; Logsdon v. Spivey, 54 Ill. 104; Smith v. Niles, 20 Vt. 320, 49 Am. Dec. 782; Allen v. McCalla, 25 Iowa, 464, 96 Am. Dec. 56; Sheffield v. Key, 14 Ga. 528; Crawford v. Newell, 23 Iowa, 453; Levy v. Shockley, 29 Ga. 710; Banks v. Evans, 10 Smedes & M. 35, 48 Am. Dec. 734; Newman v. Hook, 37 Mo. 207, 90 Am. Dec. 378; Gates v. Flint, 39 Miss. 365; Parker v. Dean, 45 Miss. 406; Watts v. Cleaveland, 3 E. D. Smith, 553; Douglas v. Orr, 58 Mo. 573; Crisfield v. Neal, 36 Kan. 278; Jones v. Howard, 99 Ga. 451, 59 Am. St. Rep. 231; Windmiller v. Chapman, 139 Ill. 163; Grand Island B. Co.

Digitized by Google

it, he does profess to levy and to assume control of the property by virtue of the execution, and with the avowed purpose of holding the property to answer the exigencies of the writ; for one who to that extent assumes dominion over the goods of another is a trespasser, unless he is justified by a valid writ.[169]

The levy ought to be notorious; it must not be made in such a manner as to indicate an intention to keep it secret. In general, a secret levy must be held invalid as against third persons.[170] Generally there must be a taking of the property into the possession of the officer, and a divesting of the possession of the owner. The officer must maintain his possession and control to such an extent that the property could not probably be taken from his custody without his knowing it.[171] "The property must be within the power and control of the officer when the levy is made, and he must take it into his possession in a reasonable time thereafter, and in such an open, public, and unequivocal manner as to apprise everybody that it has been taken in execution." [172]

v. Costello, 45 Neb. 119; Nelson v. Van Gazelle M. Co., 45 N. J. Eq. 594; Robinson v. Columbia S. Co., 52 N. Y. Supp. 751; Jones L. & M. Co. v. Faris, 6 S. D. 112, 55 Am. St. Rep. 814.

[169] Corniff v. Cook, 95 Ga. 61, 51 Am. St. Rep. 55; Boslow v. Shenberger, 52 Neb. 164, 66 Am. St. Rep. 487; Dorrier v. Masters, 83 Va. 459; Johnson v. Iron B. M. Co., 78 Wis. 159; Connah v. Hale, 23 Wend. 462; Green v. Burk, 23 Wend. 490; Gibbs v. Chase, 10 Mass. 128; Baylis v. Usher, 4 Moore & P. 790; Morse v. Hurd, 17 N. H. 246; Robinson v. Mansfield, 13 Pick. 139.

[170] Pierce v. Shipps, 16 Barb. 585; Minor v. Smith, 13 Ohio St. 79; Rives v. Porter, 7 Ired. 74.

[171] Gordon v. Gilfoil, 27 La. Ann. 265; Pleasants v. Kemp, 28 La. Ann. 124; Quackenbush v. Henry, 42 Mich. 75; Douglas v. Orr, 58 Mo. 573; Wilson v. Powers, 21 Minn. 193.

[172] Sawyer v. Bray, 102 N. C. 79, 11 Am. St. Rep. 713; Dixon v. White S. N. Co., 128 Pa. St. 397, 15 Am. St. Rep. 683; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206.

Digitized by Google

From an early day it has been frequently asserted that a levy upon a portion of the goods could be made in the name of all, and so as to bind all.[173] Recently this rule has been applied in an extreme case in England. An officer went to a mansion-house, levied upon the goods there, and proclaimed that he intended it as a levy upon all the goods of the defendant. The levy was held to bind goods situate in the defendant's farm-house, about a mile distant from the mansion-house.[174] But in New York it has been held that a levy on part in the name of all cannot bind goods which were at the time locked up, and beyond the officer's control.[175] In New Jersey, the acts which constitute a valid levy against the defendant are equally sufficient to sustain the levy against strangers to the writ. In that state nothing seems to be indispensable, except that the officer should make a list of the property and assert his intention to levy upon it.[176] So in New York, where a sheriff entered a lawyer's office in his absence, opened his book-cases, made a memorandum of his books, and the next day showed him a list and told him that he levied on the property, these acts were held to constitute a valid levy, enforceable against a subsequent purchaser.[177]

It is usual to say that a levy may be invalid as against

[173] Cole v. Davis, 1 Ld. Raym. 725; Lewis v. Smith, 2 Serg. & R. 141.

[174] Gladstone v. Padwick, L. R. 6 Ex. 203.

[175] Haggerty v. Wilber, 16 Johns. 287, 8 Am. Dec. 321.

[176] Brewster v. Vail, 1 Spenc. 56, 38 Am. Dec. 547; Wintermute v. Hankinson, 1 Halst. 140; Lloyd v. Wyckoff, 6 Halst. 218; Oliver v. Applegate, 2 South. 480; Newell v. Sibley, 1 South. 381; Casher v. Peterson, 1 South. 317; Caldwell v. Fifield, 4 Zab. 161; Dean v. Thatcher, 32 N. J. L. 470.

[177] Dean v. Campbell, 19 Hun, 534.

Digitized by Google

strangers, but valid as against the defendant.[178] Whether this is because it is necessary for the officer to perform more or different acts to make a levy as against defendant, or because, in the various cases which have arisen, the defendant has expressly or impliedly waived a performance of one or more of the acts requisite to a levy, is uncertain.[179] At all events, where an officer goes to the defendant's property or to the defendant for the purpose of making a levy, and the defendant furnishes a list of property to be taken in execution, or by any other act assents to the levy, or shows an intention to regard the levy as consummated, he seems to be thereafter estopped from alleging that there was some omission or informality in the levy.[180] So far as the making of the levy is concerned, we see no reason for declaring that it may be consummated by any different acts as against the defendant than as against third persons. Of course, if the defendant, knowing of the levy which the officer is making, submits to it, there can be no further question between him and the officer about the sufficiency of the levy, for his conduct has waived all further proceedings, and this he

[178] In Iowa this is denied. The officer must there take possession of property levied upon, in order to make a valid levy as against the defendant. Crawford v. Newell, 23 Iowa, 453; Sawyer v. Bray, 102 N. C. 79, 11 Am. St. Rep. 713.

[179] It may be admitted, as unquestionably the law is, that a levy may be good as against the defendant in the writ, when it would not be good as to third persons. But we apprehend that this distinction is not based upon any difference in the legal requisites of a levy, but in the fact that the conduct of the defendant, either by positive or negative acts, may amount to a waiver, or an estoppel, or an agreement that that shall be a levy which, without such conduct, would not be sufficient. Taffts v. Manlove, 14 Cal. 50, 73 Am. Dec. 610.

[180] Logsdon v. Spivey, 54 Ill. 104; Hill v. Harris, 10 B. Mon. 120, 50 Am. Dec. 542; Corniff v. Cook, 95 Ga. 61, 51 Am. St. Rep. 55.

Digitized by Google

is competent to do.[181] So, when a levy has been properly made, it may not be necessary to exercise so great vigilance as against the defendant, in maintaining control of the property; for having knowledge of the levy, he can never be in a position to assail it from the vantage-ground of an innocent purchaser or encumbrancer without notice. If he has submitted to the levy, it is immaterial, as far as he is concerned, whether the property was ever within the view or control of the officer.[182] So where a forthcoming or delivery bond has been executed by or on behalf of the defendant, an action thereon cannot be defeated by showing irregularities or omissions in the levy, or that no levy was in fact made.[183]

The enforcement of the levy upon an execution has often been spoken of,[184] though generally in so vague a way that it is not possible to know whether the court referred to the officer's return endorsed on the writ or to some writing made before such return and nearly contemporaneous with the levy. Doubtless an officer may properly make a memorandum on his writ or elsewhere soon after a levy on personal property, stating the fact of the levy, and the property embraced therein, and such memorandum may be used to refresh his memory, and perhaps, may constitute independent evidence of

[181] McGirr v. Hunter, 13 Ill. App. 195; Trovillo v. Tilford, 6 Watts. 468, 31 Am. Dec. 484; Bolling v. Vandiver, 91 Ala. 375; Jayne v. Dillon, 28 Miss. 283; Stuckert v. Keller, 105 Pa. St. 386; Ballard v. Dibrell, 94 Tenn. 229.

[182] Dresser v. Ainsworth, 9 Barb. 619; Rhame v. McRoy, 7 Rich. 37.

[183] Walker v. Shotwell, 13 Smedes & M. 544; Jayne v. Dillon. 28 Miss. 283; Roebuck v. Thornton, 19 Ga. 149; Pugh v. Calloway, 10 Ohio St. 488.

[184] Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 266; Bilby v. Hartman, 29 Mo. App. 125; Nighbert v. Hornsby, 100 Tenn. 81, 66 Am. St. Rep. 736; Sprague v. Brown, 40 Wis. 612.

Digitized by Google

his action. Whether specially required by statute or not, it is not part of the levy, and at best is but evidence thereof. Its omission, therefore, cannot invalidate the levy,[185] nor can its presence validate a levy otherwise insufficient. It should be remembered that we are not here speaking of the return of the writ. Of that it will be sufficient to treat hereafter.

§ 261. Leaving Defendant in Possession after Levy.— By saying that it is by no means essential that the officer should remove or even touch the property levied upon, we have impliedly asserted that is not necessary for him to take the property out of the custody of the defendant. The cases which pronounce against secret levies do not, as a general rule, require that the levy be accompanied by that degree of notoriety which attends a visible and open change of possession. They only prohibit levies in which there has been a clear attempt to prevent notoriety, and to keep the public ignorant of the true state of the defendant's affairs. It would seem that a due regard for the interests of third persons should require that the levy of the writ be accompanied or immediately succeeded by a cessation of the defendant's apparent ownership and power of disposition over the property; and that the period when the property begins to be in custody of the law should be publicly attested by the relinquishment of possession on the part of the defendant, and by the assumption of exclusive possession on the part of the officers of the law. But in most of the states, it is clear that, if the levy is otherwise perfect, it will not be invalidated by leaving the property with the defendant. The offi-

[185] Stanley v. Moynihan, 45 Ill. App. 192; Spengler v. O'Shea, 65 Miss. 75; Havens v. Gordon, 5 Hun, 178.

Digitized by Google

cer need not in any case take charge of the property in person. He may act through the agency of deputies or keepers, being in either event responsible for their conduct. If he chooses to repose especial confidence in the defendant, he may appoint him as keeper, and may leave the property in his custody. If the defendant abuses his trust by destroying the property, or by otherwise placing it beyond the power of the officer, the latter is responsible to the plaintiff in execution. But the fact that the defendant is still in possession does not authorize him to sell the property, nor does it render the property liable to seizure under subsequent writs. The levy is, for all purposes and against all persons, as binding as though the sheriff was personally in possession of the property.[186] Though the leaving of personal property in the possession of the defendant after a levy thereon neither abandons such levy nor renders it insufficient, if otherwise adequate, it is, nevertheless,

[186] Bond v. Willett, 1 Keyes, 377; 1 Abb. App. 165; Elias v. Farley, 3 Keyes, 398; 2 Abb. App. 11; 5 Abb. Pr., N. S., 39; Roth v. Wells, 29 N. Y. 471; Ray v. Harcourt, 19 Wend. 495; Van Wyck v. Pine, 2 Hill, 666; Russell v. Gibbs, 5 Cow. 390; Copley v. Rose, 2 N. Y. 115; Green v. Burke, 23 Wend. 490; Barker v. Binninger, 4 Kern. 270; Camp v. Chamberlain, 5 Denio, 198; Westervelt v. Pinckney, 14 Wend. 123, 28 Am. Dec. 516; Butler v. Maynard, 11 Wend. 548, 27 Am. Dec. 100; Bond v. Willett, 31 N. Y. 102; Gilkey v. Dickerson, 3 Hawks, 293; Tredwell v. Rascoe, 3 Dev. 50; Minor v. Smith, 13 Ohio St. 79; Ames v. Taylor, 49 Me. 381; Acton v. Knowles, 14 Ohio St. 18; Bullitt v. Winstons, 1 Munf. 269; Moss v. Moore, 3 Hill (S. C.), 276; McBurnie v. Overstreet, 8 B. Mon. 303; Weatherby v. Covington, 3 Strob. 27, 49 Am. Dec. 623; McGinnis v. Prieson, 85 Pa. St. 111; Carlisle v. Wathen, 78 Ky. 365; McCullough v. McClintock, 88 Ala. 567; Polite v. Jefferson, 5 Harr. (Del.) 388; Jones v. Parker, 55 Ga. 11; Smith v. Hughes, 24 Ill. 270; Hadley v. Hadley, 82 Ind. 95; Horsey v. Knowles, 74 Md. 602; Hard v. Foster, 98 Mo. 297; Horgan v. Lyons, 59 Minn. 217; Dean v. Thatcher, 32 N. J. L. 470; Brewster v. Vail, 20 N. J. L. 56, 38 Am. Dec. 547; Sawyer v. Bray, 102 N. C. 79, 11 Am. St. Rep. 713; Nighbert v. Hornsby, 100 Tenn. 82, 66 Am. St. Rep. 736.

Digitized by Google

dangerous to the levying officer, because it makes the defendant in execution the agent of the officer for the purpose of preserving the property and maintaining the levy. The consequence is, that if the defendant consumes or otherwise disposes of the property, so that it cannot be sold and its proceeds ultimately applied to the satisfaction of the writ, the officer is answerable for this misconduct of his agent to the plaintiff in execution.[187]

The fact that the property, when capable of removal, is left with the defendant, may, nevertheless, operate to the prejudice of plaintiff's rights. An execution taken out or levied with a view to hinder, delay, or defraud creditors or others is void as against creditors and subsequent purchasers. An intent to hinder, delay, or defraud creditors will be inferred from the fact that the levy is not made for the purpose of enforcing a satisfaction of the writ; that the levy was not made for this purpose may, in turn, be inferred from the fact that the defendant, for some considerable time, is permitted to enjoy the use and retain the possession of the property as before the levy.

Though the authorities are not entirely harmonious, the vast majority of them sustain these propositions: 1. The fact that the officer, after levying, left the property with the defendant, is not of itself sufficient to establish a fraudulent use of the writ,[188] unless the sale is deferred, and the defendant's possession continued for so

[187] Lyon v. Horner, 32 W. Va. 432.

[188] Farrington v. Sinclair, 15 Johns. 428; Etheredge v. Edwards, 1 Swan, 426; Cumberland Bank v. Hann, 4 Harr. (Del.) 166; Herkimer Co. v. Brown, 6 Hill, 232; Butler v. Maynard, 11 Wend. 551, 27 Am. Dec. 100; Howell v. Alkyn, 2 Rawle. 282; Commonwealth v. Stremback, 3 Rawle, 341, 24 Am. Dec. 351; Wood v. Vanarsdale, 3 Rawle, 401.

Digitized by Google

unusual and unreasonable a period as to give rise to the presumption that the conduct of the officer was prompted or ratified by the plaintiff;[189] 2. That the interference of the plaintiff with the execution of the writ, whereby he procures the property to be left in the custody of the defendant generally,[190] but not universally,[191] renders the writ fraudulent and void as against the vendees and creditors of the defendant. But wherever it appears that the property was left with the defendant, not merely as its custodian, but with intent that he should continue to exercise the full powers of ownership, including the power of sale, the most indulgent of courts will not hesitate to treat the levy as colorable and fraudulent.[192]

[189] United States v. Conyngham, 4 Dall. 358; Dean v. Patton, 13 Serg. & R. 345; Corlies v. Stanbridge, 5 Rawle, 286; Levy v. Wallis, 4 Dall. 167; Kellogg v. Griffin, 17 Johns. 274; Swigert v. Thomas, 7 Dana, 220; Bourne v. Hocker, 11 B. Mon. 25; Impey on Sheriffs, 125; Dickenson v. Cook, 17 Johns. 332; Lewis v. Smith, 2 Serg. & R. 142.

[190] Parker v. Waugh, 34 Mo. 340; Berry v. Smith, 3 Wash. C. C. 60; Rew v. Barber, 3 Cow. 272; Storm v. Woods, 11 Johns. 110; United States v. Conyngham, 1 Wall. C. C. 178; Russell v. Gibbs, 5 Cow. 390; Ball v. Shell, 21 Wend. 222; Knower v. Barnard, 5 Hill, 377; McClure v. Ege, 7 Watts, 74; Hickman v. Caldwell, 4 Rawle, 376; 27 Am. Dec. 274; Wood v. Gary, 5 Ala. 43; Patton v. Hayter, 15 Ala. 18; Zug v. Laughlin, 23 Ind. 178; Earl's Appeal, 13 Pa. St. 483; Weir v. Hale, 3 Watts & S. 285; Imray v. Magnay, 11 Mees. & W. 267; Hunt v. Hooper, 12 Mees. & W. 664; Sawle v. Paynter, 1 Dowl. & R. 307; Eberle v. Mayer, 1 Rawle, 366; Slocomb v. Blackburn, 18 Ark. 309; Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380; Kirkpatrick v. Cason, 1 Vroom, 331; Mentz v. Hamman, 5 Whart. 150, 34 Am. Dec. 546.

[191] Casher v. Peterson, 1 South. 317; Williamson v. Johnston, 7 Halst. 86; Sterling v. Van Cleve, 7 Halst. 285; James v. Burnet, Spencer, 636; Houston v. Sutton, 3 Harr. (Del.) 37; Snipes v. Sheriff, 1 Bay, 295; Brown v. Gilliland, 3 Desau. 539; Greenwood v. Naylor, 1 McCord, 414.

[192] Cook v. Wood, 1 Harr. (N. J.) 254; Wunderlich v. Roberts, 67 Ind. 421; Parys & Co.'s Appeal, 5 Wright, 273; Keyser's Appeal, 13 Pa. St. 409, 53 Am. Dec. 487; Swigert v. Thomas, 7 Dana, 220; Cum-

Digitized by Google

The lien of an attachment is usually regarded as being dependent for its inception and continuance upon an actual seizure of the property. Therefore, in levying an attachment, the property must be taken and kept from the possession of the defendant.[193] This rule, which we have just stated to be applicable to levies of attachments, is, in several of the states, equally applicable to levies of executions. In these states the officers levying executions must take possession of the property in person or by keepers. The defendant cannot be one of these keepers. The levy must be succeeded by such a change of possession as is open and visible. The officers must be in charge of the property, so that persons about to deal with it will, by the exercise of ordinary powers of observation, know that it is no longer in the control of the defendant. If the property is not removed to another place, a keeper should be kept with it, and in case of his temporary absence, the property should be locked up or otherwise kept from the possession of the defendant. If the officer levying does not take and retain possession, his levy is invalid as against purchasers or subsequently levying creditors.[194] If the sheriff's keeper, by collusion with an-

berland Bank v. Hann, 4 Harr. (N. J.) 167; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206; Heitzman v. Divil, 11 Pa. St. 264; Farrington v. Sinclair, 15 Johns. 428; Sanders v. Clark, 6 Hous. 462.

[193] Bagley v. White, 4 Pick. 395, 16 Am. Dec. 353; Fettyplace v. Dutch, 13 Pick. 388, 23 Am. Dec. 688; Mills v. Camp, 14 Conn. 219, 36 Am. Dec. 488; Taintor v. Williams, 7 Conn. 271. See Drake on Attachment, §§ 255-257.

[194] Dutertre v. Driard, 7 Cal. 549; Border v. Benge, 12 Iowa, 330; Portis v. Parker, 8 Tex. 23, 58 Am. Dec. 95; Converse v. McKee, 14 Tex. 30; Barnes v. Billington, 1 Wash. C. C. 29; Havely v. Lowry, 30 Ill. 446; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206; Crawford v. Newell, 23 Iowa, 453; Calderwood v. Prevost, 9 Rob. (La.) 182; Miller v. Streeder, 18 La. Ann. 56; Simpson v. Allain, 7

Digitized by Google

other officer, surrenders or abandons possession to enable the latter to levy, this collusive act cannot prejudice the prior levy.[195]

§ 262. Acts Necessary to Levy of Attachment.—In the preceding section, we have stated that, in some of the states, the acts necessary to a valid levy of an attachment were equally essential to the valid levy of an execution. We shall, therefore, devote this section to the consideration of those necessary acts. "The nature of the possession and custody which an officer is to keep will depend upon the nature and position of the property, as ships, rafts, piles of lumber, masses of stone, or lighter, more portable, and more valuable goods. In general, it may be said that it shall be such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn, or taken by another, without his knowing it." [196] "The doings of an officer, in respect to personal property, cannot amount to a valid attachment, unless the articles are taken into his actual custody, or are placed under his exclusive control. The articles must be within the power of the officer. He must continue to retain this power over them by remaining present himself, by appointing an agent

Rob. (La.) 500; Scott v. Niblett, 6 La. Ann. 182; Taylor v. Stone, 2 La. Ann. 910. The North Carolina cases may not fully sustain the rules laid down in the text; but they certainly require that the levy should soon, if not immediately, be followed by such a change in the condition and control of the property as will reveal to ordinary observers the true condition of affairs. Wilson v. Hensley, 4 Ired. 66; Roberts v. Scales, 1 Ired. 88; Mangum v. Hamlet, 8 Ired. 44; Rives v. Porter, 7 Ired. 74.

[195] Leach v. Pine, 41 Ill. 66, 89 Am. Dec. 375.

[196] Hemmenway v. Wheeler, 14 Pick. 410, 25 Am. Dec. 411; Russell v. Major, 29 Mo. App. 167; Poling v. Flanagan, 41 W. Va. 191.

Digitized by Google

in his absence, by taking a receipt for the property, by inventorying and marking them, or by a seasonable removal of them. It is not necessary that they should be removed, but they must, in all cases, be put out of the control of the debtor."[197] The officer who is attempting to levy an attachment must, in the first place, go where the property is. He must get it within his view, and subject to his control. In the case of Taffts v. Manlove,[198] the sheriff went to the store of the defendant. The store was found securely fastened in front and rear by iron shutters. The officer and his deputies stationed themselves at these closed entrances and prevented all ingress or egress. While they were thus standing guard, the debtor filed his petition in insolvency. Immediately thereafter, on the sheriff's threat that he would force the doors, he was given the key. He then entered, levied on the goods, made his inventory, and left a keeper in charge. A contest then took place in the courts between the sheriff and the debtor's assignee, under the proceedings in insolvency. This contest resulted in favor of the assignee, the supreme court saying: "It is too plain for argument that there can be no levy when the officer does not even know the subject of the levy. As well might a sheriff stand in the street, and levy upon the contents of a banking house, as to stand in a store door at midnight, and claim that, merely by standing there, and preventing any person from coming into the store, he had levied on the contents, whatever they were, of the store; and this without having any knowledge of the general nature of the stock, much less of the particular descrip-

[197] Lyeth v. Griffis, 44 Kan. 159; Robinson v. Columbia S. Co., 49 N. Y. Supp. 4; Barney v. Rockwell, 60 Vt. 444; Bryant v. Osgood, 52 N. H. 185.

[198] 14 Cal. 47, 73 Am. Dec. 610.

Digitized by Google

tion or value. But, as we said before, nothing appears to show that the mere watching and guarding of the storehouse was meant to be a levy on the property inside; but these were acts merely in prosecution of the design to enter the house, and levy on the property there, which purpose was afterward accomplished." An officer went to the residence of an absconding debtor for the purpose of levying an attachment. The wife of the debtor's landlord told the officer about a mule then in a locked barn on the premises, and described it so that it might be distinguished from other mules in the same barn, belonging to her husband. She also offered to get a key to the barn for the officer. He declined it as unnecessary, looked through a crack in the barn, saw the mule, indorsed a levy on the writ, informed her of what had been done, and asked her to keep the mule for the officer, which she agreed to do. He then went away. A few minutes afterward another officer came, armed with another writ, got possession of the key, entered the barn, seized the mule, and took him into his actual possession. The first officer was held not to have made any levy.[199]

The property attached must always be put within the control of the officer, and therefore beyond the control of the defendant.[200] In one case it was held that the property must be touched by the officer. Hence, when one officer gained entrance to a building, and proclaimed a levy on its contents, and another officer, subsequently entering, took hold of a particular article and

[199] Evans v. Higdon, 1 Baxt. 245.

[200] Odiorne v. Colley, 2 N. H. 66, 9 Am. Dec. 39; Lane v. Jackson, 5 Mass. 157; Huntington v. Blaisdell, 2 N. H. 317; Kilbourne v. Frellsen, 22 La. Ann. 207; Page v. Generes, 6 La. Ann. 551; Lyon v. Rood, 12 Vt. 233; Tomlinson v. Collins, 20 Conn. 364; Kiesel v. Union P. R. Co., 6 Utah, 128.

Digitized by Google

levied on it, precedence was accorded to the latter levy.[201] But this case is in opposition to a strong and decisive current of authorities. It is not essential that the property should be moved or touched. It is enough that the officer assumes control under the writ, and keeps some one in charge of the property.[202] Thus, an officer may enter a store, proclaim his levy, obtain possession of the keys, and lock the doors. Here the property, being within his control, must be treated as subject to a valid attachment.[203] The possession of the officer must not be temporary in its character. It must continue as long as it is desired that the attachment lien should remain in force. An abandonment of the possession is an abandonment of the levy. The property must not be restored to the real or apparent custody of the defendant. The change of possession must be actual and substantial, and not merely formal or colorable. It is not indispensable that the officer should be in visible possession every moment. But his connection with and control of the property ought, nevertheless, to be so continuous that it cannot probably be removed or disturbed without his knowledge.[204] But if the defendant obtains admission to a building where the property is by entering through a back door, of which the officer had no knowledge,[205] or by enter-

[201] Hollister v. Goodale, 8 Conn. 332, 21 Am. Dec. 674.

[202] Nichols v. Patten, 18 Me. 231, 36 Am. Dec. 713; Naylor v. Dennie, 8 Pick. 198, 19 Am. Dec. 319; Huntington v. Blaisdell, 2 N. H. 317; Trounstein v. Rosenham, 22 La. Ann. 525.

[203] Denny v. Warren, 16 Mass. 420; Gordon v. Jenney, 16 Mass. 465; Shephard v. Butterfield, 4 Cush. 425; Newton v. Adams, 4 Vt. 437.

[204] Burrows v. Stoddard, 3 Conn. 160; Nichols v. Patten, 18 Me. 231, 36 Am. Dec. 713; Sanderson v. Edwards, 16 Pick. 144; Boynton v. Warren, 99 Mass. 172; Hardin v. Sisson, 36 Ill. App. 383.

[205] Shephard v. Butterfield, 4 Cush. 425.

Digitized by Google

ing a room by the officer's permission, and then locking him out,[206] neither of these acts will suspend nor destroy the attachment lien. Various requirements have been imposed by the statutes of several states for the levying of attachments which are not applicable to the levying of executions, such as that written notice of the levy shall be given to the defendant, that a copy of the writ shall be left with the person holding the property, or served in a manner designated, or that the return of the officer shall show that the property belongs to the defendant. The general tendency of the courts is to regard these requirements as mandatory, and hence, to declare insufficient any attempted levy or attachment in which they have not been substantially respected.[207]

§ 262 a. Property not Capable of Manual Delivery.— Property of great value belonging to the defendant may be of such a character or so situated that it cannot be seized upon and taken into the possession of the officer holding the writ. This is frequently the case with stocks or shares in corporations, and with various choses in action, where such shares or choses are subject to execution. In almost every state, statutes have been enacted upon this subject, designating the various steps to be taken in levying the writ. These statutes are so numerous and so dissimilar that we shall not here attempt their compilation, nor undertake to present any very exact statement of their general purport. With respect to shares in corporations, the usual method of making a levy is by leaving a copy of the

[206] Harriman v. Gray, 108 Mass. 229.

[207] Hamilton v. Hartinger, 96 Iowa. 7; Courtney v. Eighth Ward Bank, 154 N. Y. 688; Offterdinger v. Ford, 86 Va. 917.

Digitized by Google

writ with the president, secretary, cashier, or other chief officer, with a notice stating that the shares of stock held by the defendant are levied upon under the writ.[208] In some of the states the requirement of the statute is, that the officer shall notify an officer of the corporation of the levy. In Iowa it has been held that such notice must be in writing, and a levy was declared invalid, because the notice was oral, though the accompanying facts showed that the officers of the corporation received and acted upon it, and it must, therefore, have answered all the purposes which could have been accomplished by a written notice.[209] It is believed that these decisions were unjustifiably technical, and, furthermore, that they improperly interpolated into the statute a direction not found therein and not inferable therefrom, namely, that the notification must be in writing.[210] The notice which is required to be given to an officer of a corporation may be general in its character and to the effect that all the interest or shares of the defendant in the corporation are levied upon.[211] This must necessarily be so, for the levying officer can rarely know either the number of shares held

[208] Union N. B. v. Bryan, 131 Ill. 92; Parker v. Sun I. Co., 42 La. Ann. 1172; Voorhis v. Terhune, 50 N. J. L. 147, 7 Am. St. Rep. 781; Abbott v. Kimball (N. H.). 38 Atl. 1061; Keating v. Stone L. Co., 83 Tex. 467, 29 Am. St. Rep. 670; Wyoming F. Assn. v. Talbot, 3 Wyo. 244; Thompson on Corp., § 2790; Ala. Civ. Code, 1886, § 1673; Ga. Code, 1895, § 5430; Powell v. Parker, 38 Ga. 644; Bailey v. Strohecker, 38 Ga. 259, 95 Am. Dec. 338; Rev. Stats. Ariz., 1887, § 1908; Cal. Code Civ. Proc., § 542; Starr v. Curtis' Ann. Ill. Stats., 2d ed., p. 2376, § 53; Code of Iowa, 1897, § 3894; Conn. Genl. Stats., 1888, § 1171; Rev. Stats. Me., 1883, p. 677, § 27, p. 722, § 13; N. Y. Code Civ. Proc., § 640; Mechanics' & T. Bank v. Dakin, 33 How. Pr. 316, 50 Barb. 587.

[209] Moore v. Marshalltown O. H. Co., 81 Iowa, 45; Moear v. Walker, 46 Iowa, 164.

[210] Abels v. Planters' I. Co., 92 Ala. 382.

[211] O'Brien v. Mechanics' I. Co., 56 N. Y. 52.

Digitized by Google

by the defendant or the number or dates of the certificates by which they are evidenced. In truth, the statutes often require that the officer of a corporation with whom the writ is left, or to whom the notice of the levy is given shall, by a certificate or otherwise, disclose the shares or interest of the defendant in the corporation. Compliance by the officer is not essential to the validity of the levy.[212] The levying officer must, however, in some manner ascertain, before proceeding to a sale, what number of shares or interest he is selling, for an execution sale of all the shares of the defendant in the corporation without anything to identify them is void for indefiniteness.[213] If the stock has been properly levied upon under a writ of attachment, no further levy thereon is required on the issuing of execution on a judgment recovered in the same action.[214] "At common law, corporate shares were not subject to levy and sale under execution. This, however, has been changed by statute in many of the states, and where such a change has been made, the authorities all agree that if the statute authorizing such a levy and sale has not been substantially complied with, then the sale is unauthorized and void, and cannot, as in case of a sale being voidable merely on account of some irregularity, be ratified."[215] This language must be qualified so as not to require of the officer the performance of impossibilities. Thus the statutes of Michigan declared that the share or interest of a stockholder might be taken in

[212] Blair v. Compton, 33 Mich. 416; Thompson on Corporations, § 2791.

[213] Keating v. Stone L. Co., 88 Tex. 467, 29 Am. St. Rep. 670.

[214] McFall v. Buckeye etc. Assn., 122 Cal. 468, 68 Am. St. Rep. 47.

[215] Blair v. Compton, 33 Mich. 425; Goss Mfg. Co. v. People, 4 Ill. App. 510.

Digitized by Google

execution by leaving a copy of the writ, certified by the officer, "with the clerk, treasurer, or cashier of the company, if there be such officer, and if not, then with any officer or person who has at the time the custody of the books and papers of the corporation, and the property shall be considered seized on execution where such a copy is left." An officer, having an execution against a stockholder, indorsed thereon that "there was no clerk, treasurer, or cashier of the corporation in his bailiwick," and that he therefore served the writ by delivering a copy to certain persons who, he was informed, had the custody of the books and papers of the company: "N. H. B., deputy, secretary, or clerk of said company; W. M. S., in charge of the office of the company; and B. S. C., president of said company." The court held that the clerk, treasurer, and cashier might all reside out of the state, in which event the officer could not serve any of them; that the law did not contemplate that, in this contingency, he should be without power to serve the writ; and, therefore, that he might leave the copy of the writ with other officers whom he found in charge of the office of the corporation, and who, as he was informed, had the custody of the books and papers of the company, though this latter information was derived from third parties.[216] The Illinois statute on this subject is identical with that of Michigan, except that an attested copy of the execution is required to be left with the clerk, treasurer, or cashier, etc. The word "clerk," as here used, means "that officer who usually has the custody of the books and records of the company. The secretary of the corporation is but another name for the same officer." When the sheriff delivers to the proper officer of

[216] Blair v. Compton, 33 Mich. 425.

Digitized by Google

the corporation a copy of the execution, indorsed by him: "The within is a true copy of the execution and fee-bill in my hands, under which I have seized the shares of stock of the within-named defendant," etc.—this is a sufficient attesting of the copy to sustain the levy, especially where the corporation recognizes it, and does the acts required to be done by it when a levy is made.[217] In Tennessee, shares of stock in private corporations are subject to levy and sale under execution. Possession of the certificates by the officer is not essential. All that seems to be required is for the officer to make a formal levy, and then, or as soon thereafter as practicable, give notice either personally or in writing to the secretary or other officer intrusted with the books of the corporation. Subsequent transfers are taken in subordination to such levy.[218]

Shares of stock have their situs at the principal place of business of a corporation, and hence, cannot ordinarily be levied upon in another state or country, even though the officer should be able to obtain possession of the certificate of the shares held by the defendant.[219] Possibly a corporation may become so completely a resident of two or more states that its stock may be garnished or levied upon in either.[220]

In California, a house standing on leased lands is held to be capable of manual delivery, and therefore subject to levy only by taking it into the possession of the officer,[221] while a growing crop is regarded as not

[217] People v. Goss and Phillips Mfg. Co., 99 Ill. 355.

[218] Memphis Appeal Pub. Co. v. Pike, 9 Heisk. 697.

[219] Armour Bros. B. Co. v. Smith, 113 Mo. 12; Plimpton v. Bigelow, 93 N. Y. 593; Young v. South Tredegar I. Co., 85 Tenn. 189, 4 Am. St. Rep. 752; Thompson on Corp., § 2766.

[220] Young v. South Tredegar I. Co., 85 Tenn. 189, 4 Am. St. Rep. 752.

[221] Coleman v. Collier, 11 Pac. C. L. J. 567.

Digitized by Google

capable of manual delivery, and hence may be levied upon by leaving with the person having such crop in his possession or control, or with his agent, a copy of the writ, with a notice that such property is levied upon thereunder.[222]

In the greater number of the states, choses in action, and other personal property not capable of manual delivery, are reached by trustee process, foreign attachment, garnishment, or by proceedings supplemental to execution, and not by direct seizure. In such cases, the person indebted to the defendant, or who has property of the defendant's in his hands, which cannot, either owing to its character or to the obligations attached to it by pledging or otherwise, be seized by the officer, must be notified that the debt or property is attached under the writ.[223] As choses in action were not subject to levy under execution at the common law, and the right to levy thereon and the mode of its exercise were of statutory creation, it is evident that the mode so created must be substantially pursued. Otherwise the levy is invalid.[224] In New York it was formerly thought that the notice must specially designate the credits sought to be attached, and that a general notice stating that all the property of the defendant is attached was insufficient.[225] This view must now be

[222] Raventas v. Green, 57 Cal. 254.

[223] Ala. Civ. Code, 1886, § 2945; Rev. Stats. Ariz., 1887, §§ 75, 77; Starr & Curtis's Ann. Ill. Stats., 2d ed., p. 457, § 21; Code of Iowa, 1897, §§ 3897, 3935; Cal. Code Civ. Proc., § 542; N. Y. Code Civ. Proc., § 649.

[224] Wheaton v. Spooner, 52 Minn. 417; McLaughlin v. Alexander, 2 S. D. 226.

[225] O'Brien v. Mechanics' Ins. Co., 14 Abb. Pr., N. S., 314; 45 How. Pr. 453, reversed in 56 N. Y. 58; Kuhlman v. Orser, 5 Duer, 242; Wilson v. Duncan, 11 Abb. Pr. 3; Clarke v. Goodridge, 41 N. Y. 210. Contra, Greenleaf v. Munford, 19 Abb. Pr. 469; 30 How. Pr. 30; Drake v. Goodridge, 54 Barb. 78.

Digitized by Google

conceded to be erroneous. "A notice by the sheriff that he attaches all property, debts, and effects, and all rights and shares of stock, etc., in the possession or under the control of the individual served, does show the property levied on. A particular description of the property or debts supposed to be in the possession of or owing by him is not necessary for the information of the party served, and would not more satisfactorily show to him the property intended to be reached. The individual served necessarily knows better than the officer can know the property and debts in his possession, or owing by him, subject to attachment. A notice by the sheriff that he attached all the bonds and mortgages and promissory notes belonging to the attachment debtor, in the possession of an individual, would be good without specifying the particular securities and the names of the debtors; and if perchance there should be but one bond and mortgage, and no promissory notes, the excessive claim would not vitiate. To require a particular description of the rights, debts, and choses in action, which would identify and distinguish them from all others of a like kind, would be to render the remedy by attachment, in a great majority of cases, abortive as a process against property of this character. Neither the pursuing creditor nor the sheriff can ordinarily know the precise character of the dealings between the debtor proceeded against and third persons; and if no levy can be made until, by proceedings under section 36 of the code, the particulars can be ascertained, it is quite evident that the provisional remedy would in very many cases be of but little practical value. The remedy was designed to be effectual; and, to make it so, any notice which shows to the party served that any particular part or all of the property or

Digitized by Google

debts in his possession belonging to the debtor in the attachment proceedings or owing by him, is attached, and intended to be claimed and held by the sheriff, must be held sufficient." [226]

A levy upon a bill of lading is not equivalent to a levy on the goods therein described, and creates no lien against such goods, though they are so situated that the officer cannot seize them, being beyond his territorial jurisdiction.[227]

Books of account, while they may contain correct statements of the accounts between parties, are not choses in action. They are mere evidence of the existence of such choses. A levy upon and taking possession of them would be entirely inoperative, unless as a levy upon the paper and other materials of which they are composed. The credits therein shown can only be levied upon by serving notices, as in case of other property not capable of manual delivery.[228] If an officer assumes to levy upon accounts by taking possession of the books of account of the judgment debtor and by delivering them to a person with authority to collect the accounts represented therein, moneys collected by the latter are the property of the judgment debtor and subject to another execution against him.[229]

Articles of personal property may be capable of manual delivery, and yet it may be improper for the officer to take them into his possession, because, to do so, interferes with the rights therein of persons other

[226] O'Brien v. Mechanics' & T. Ins. Co., 56 N. Y. 58; Carter v. Koshland, 12 Or. 493. See, as to levy on a judgment, Dore v. Dougherty, 72 Cal. 232, 1 Am. St. Rep. 48.

[227] Taacks v. Schmidt, 18 Abb. Pr. 307.

[228] Swart v. Thomas, 26 Minn. 141; Ide v. Harwood, 30 Minn. 191.

[229] Cedar Rapids P. Co. v. Miller, 105 Iowa, 674, 67 Am. St. Rep. 322.

Digitized by Google

than the judgment debtor, as, where it is pledged to the possessor, or he holds it under a chattel mortgage. In such cases, the officer must usually treat the property as not capable of manual delivery, and make his levy by serving notice thereof on the person lawfully in possession,[230] though, in some of the states, the officer is permitted to make a levy in subordination to the rights of the pledgee or mortgagee, and to take possession and retain it until the sale.

§ 263. Levies on Ponderous and Immovable Property. We have already stated that, in determining the sufficiency of an alleged levy, the character of the property must sometimes be considered. The law does not require impossibilities. Therefore, it does not require that the same acts shall be requisite to a levy upon ponderous or immovable property as upon that of which a complete and visible change of possession may be easily consummated.[231]

Growing crops cannot be taken into possession of the officer, except by destroying them, or by disseising the owner of the real estate on which they are growing. When about to levy on them, the officer should give the act as much notoriety as possible. It would be prudent in him to call witnesses, and indorse that fact on the writ.[232] In North Carolina, he must go on the land and proclaim the levy.[233] But in other states, the mere indorsement of the levy on the writ seems to be

[230] Warner v. New York Fourth N. B., 115 N. Y. 251; Lewis v. Birdsey, 19 Or. 164; Dorrier v. Masters, 83 Va. 459.

[231] Farrington v. Sinclair, 15 Johns. 428; Stanley v. Moynihan, 45 Ill. App. 192; Bilby v. Hartman, 29 Mo. App. 125; Long v. Hall, 97 N. C. 286.

[232] Davidson v. Waldron, 31 Ill. 120. 83 Am. Dec. 206.

[233] State v. Poor, 4 Dev. & B. 384, 34 Am. Dec. 387.

Digitized by Google

all that is required.[234] In California, the levy on growing crops may be made in the same manner as upon personal property not capable of manual delivery, and when the defendant is the person in possession, he is the only person upon whom a copy of the writ need be served.[235] When the crop, though still standing in the field, or resting in the ground, has matured, and is ready to be dug or harvested, a formal levy is insufficient. The officer must harvest the crop, and bring it into his possession.[236] It seems not to be necessary for him to gather or harvest it immediately. Thus, where a levy upon a crop of corn was assailed, because the officer did not at once take possession, the court said: "It is urged by counsel that the sheriff's levy was not sufficient to bind the property, for the reason that the officer did not take actual possession of the property. The corn levied upon was in the field, ungathered. Prior to the levy, the sheriff notified the defendants in this case of his purpose to levy on the corn, and just before, or at the time of the levy, he notified the defendant in execution that he was about to make the levy. He went into the field for that purpose. It appears that he did all that could have been done, in order to take possession of the property, and to notify persons interested of the fact that he had made the levy. It is not usual for owners of cornfields to keep a watch and guard over them. They retain possession without such precautions. The sheriff, having taken possession of the corn, would retain it by pursuing such course

[234] Bilby v. Hartman, 29 Mo. App. 125; Johnson v. Walker, 23 Neb. 736; Pierce v. Roche, 40 Ill. 292; Whipple v. Foot, 2 Johns. 418, 3 Am. Dec. 442; Hartwell v. Bissell, 17 Johns. 128.

[235] Raventas v. Green, 57 Cal. 254.

[236] Heard v. Fairbanks, 5 Met. 111.

Digitized by Google

as owners of property usually take to retain possession."[237]

A levy upon corn contained in a crib, and too great in bulk and quantity for immediate delivery, was sustained against a stranger to the writ, by proof that the officer notified the defendant in execution, indorsed the levy upon his writ, proceeded to nail boards on the crib so as to secure the corn, gave public notice to several persons standing near the crib that he had levied on the corn, and that it must not be disturbed.[238]

A term of years is personal property, and subject to execution as such.[239] The decisions are singularly reticent concerning the mode of levying upon it. The officer can hardly be required to enter into the possession of the premises, nor to oust the tenant, nor "required to exercise any dominion or control over it, founded on any idea of a right to the possession. He should, no doubt, proclaim his levy to those in charge, and notify the tenants of it; but, strictly speaking, I do not find that even that is necessary."[240] And, where the lessee has machinery and fixtures fixed to the realty, ponderous and incapable of manual delivery without a severance from the soil, it is said that the officer would not be justified in tearing out, severing, and removing them, nor need he put a watchman in charge.[241]

A stack of grain may be levied upon by going to it,

[237] Barr v. Cannon and Gunn, 69 Iowa, 21.

[238] Richardson v. Rardin, 88 Ill. 124; Stanley v. Moynihan, 45 Ill. App. 192; State v. Cassidy, 4 S. D. 58.

[239] Buhl v. Kenyon, 11 Mich. 249; Dalzell v. Lynch, 4 Watts & S. 255; Sowers v. Vie, 14 Pa. St. 99; Williams v. Downing, 18 Pa. St. 60.

[240] Steers v. Daniel, 4 Fed. Rep. 596; 2 Flipp. 310.

[241] Steers v. Daniel, 4 Fed. Rep. 598; 2 Flipp. 310; Burr v. Graves, 4 Lea, 552.

Digitized by Google

making a formal levy, and forbidding defendant from touching it.[242] A similar levy seems to be sufficient to create an attachment lien on hewn stones,[243] iron ore,[244] and mill logs.[245]

What is essential to constitute a levy on a band of wild cattle was discussed, but not decided, in an early case in Texas.[246] In Georgia, a levy on cattle as they run is void. Possession must be taken at once, or as rapidly as practicable.[247] The statutes of Texas provide that "a levy upon horses, mules, jacks, jennets, horned cattle, or hogs running at large in a range, and which can be herded or penned without great inconvenience and expense, may be made by designating by reasonable estimate the number of animals, and describing them by their marks or brands, or either; such levy may be made in the presence of two or more creditable persons, and notice thereof shall be given in writing to the owner, or his herder or agent, if resident within the county and known to the officer." It has been held that cattle may be regarded "as running at large on a range," within the meaning of this statute, if in a pasture of about four hundred thousand acres, intersected with roads, although the entrances may be guarded, and, furthermore, that such levy was valid, though such pasture included parts of three different counties and that a sale thereunder would confer a right to the entire stock, though they should be found

[242] Gallagher v. Bishop, 15 Wis. 276. See, also, Merrill v. Sawyer, 8 Pick. 397.

[243] Hemmenway v. Wheeler, 14 Pick. 408; Polley v. Iron Works, 4 Allen, 329.

[244] Mills v. Camp, 14 Conn. 219, 36 Am. Dec. 488.

[245] Bicknell v. Trickey, 34 Me. 273. For levy on lumber, see Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206.

[246] Portis v. Parker, 8 Tex. 28, 58 Am. Dec. 95.

[247] Sheffield v. Key, 14 Ga. 528.

Digitized by Google

in a county other than that in which the levy and sale were made, and that, if the sheriff undertook to make one levy and sale for each county, of an estimated number assumed to be in each, that such sale was void.[248] On the other hand it is settled that if the stock is confined in a pasture, all of which is unfenced, and the area of which does not exceed twelve hundred and eighty acres, that a levy made in the manner designated for a range levy is improper and invalid.[249]

In New Hampshire, a levy on property not capable of being taken into the officer's possession must be made in the same manner as a levy upon real estate.[250] The law in regard to the change in the possession of property levied upon under an execution very much resembles that in regard to the change of possession accompanying a sale of chattels. In the majority of the states, the fact that the property is not subjected to an immediate change of possession, though it may be evidence of fraud, is not conclusive against either a sale or a levy. In the minority of the states, the want of this change is alike conclusive against the validity both of a sale and of a levy, when the rights of third persons are drawn in question. But when the articles are such that their delivery or removal is difficult or impossible, there must be a modification or an entire suspension of the general rule requiring such delivery or removal. In a preceding chapter we have considered the cases in which, owing to the character of the property, a sale need not be accompanied by an immediate and visible change in the possession of the

[248] Gunter v. Cobb, 82 Tex. 598.

[249] Lindsey v. Cope, 91 Tex. 463, affirming Cope v. Lindsey, 17 Tex. Civ. App. 203.

[250] Bryant v. Osgood, 52 N. H. 182.

Digitized by Google

chattels sold. We refer to the decisions there cited and the principles there announced, believing they must prove of material assistance in determining the cases in which, owing to the character of the property, an officer levying a writ may be either wholly excused from taking possession, or, if not wholly excused, may be justified in assuming only that amount and character of dominion to which the property can be readily subjected.

§ 264. Forthcoming and Delivery Bonds.—In many of the states, the defendant may retain possession of property levied upon if he sees proper to execute a bond, with sufficient sureties, conditioned that he will have the property present to be sold at the time and place appointed for the sale. These bonds are sometimes called "forthcoming" and sometimes "delivery" bonds. Their form differs somewhat in the different states. But even if the form is not in conformity with statutory regulation, the bond may, nevertheless, often be enforced, because its form and substance are sufficient to constitute a good common-law obligation.[251] Hence, a bond without sureties, though not in conformity to the statute, may be enforced if the plaintiff accepts it.[252] While bonds defective for noncompliance with the statute in some respects are, as already stated,

[251] Adler v. Green, 18 W. Va. 201; Turner v. Armstrong, 9 Ill. App. 24; Butler v. O'Brien, 5 Ala. 316; Grant v. Brotherton, 7 Mo. 458; Meredith v. Richardson, 10 Ala. 828; Waterman v. Frank, 21 Mo. 108; Selmas v. Smith, 21 Mo. 526; Palmer v. Vance, 13 Cal. 553; Frisch v. Miller, 5 Pa. St. 310; Mitchell v. Ingram, 38 Ala. 395; Adler v. Potter, 57 Ala. 571; Sheppard v. Collins, 12 Iowa, 570; Garretson v. Reeder, 23 Iowa, 21; Painter v. Gibson, 88 Iowa, 120; Johnson v. Weatherway, 9 Kan. 75; Stocker v. Dech, 167 Pa. St. 212; Jacobs v. Dougherty, 78 Tex. 682; Adler v. Green, 18 W. Va. 201.

[252] Walker v. McDowell, 4 Smedes & M. 118, 43 Am. Dec. 476.

Digitized by Google

enforceable as common-law obligations, they are not, strictly speaking, forthcoming or delivery bonds in the sense in which we are here speaking of those instruments, for they are enforceable only by action and not by the summary proceedings authorized in the case of a bond executed in strict compliance with the statute.[253]

The object of the bond is to permit the defendant to continue in the use and possession of the property levied upon, and at the same time to secure its being forthcoming when needed for the satisfaction of the writ.[254] A forthcoming or delivery bond must be given by the person whose property has been levied upon.[255] If given by any one else, it is not the bond sanctioned by the statute. Hence, if the defendant dies after the issue, and before the levy of the writ, no one can give the bond. If the sheriff chooses to take a bond given by the widow of the decedent, though it may be valid as a common-law obligation, it is not enforceable as a statutory forthcoming bond.[256] The proposition that if the defendant dies after the issuing of an execution and before its levy, no one can give a forthcoming or delivery bond is unreasonable. By his death the title to his personalty vests in his executors or administrators, who have the same interest in executing such a bond as the deceased would have had had he survived. They are within the language of the statute permitting such bond to be given by any one whose

[253] Russell v. Locke, 57 Ala. 420; Lowenstein v. McCadden, 54 Ark. 13; Selmas v. Smith, 21 Mo. 526.

[254] Skinner v. Jayne, 24 Miss. 567.

[255] Nabours v. Cocke, 24 Miss. 44. A person giving a delivery bond may doubtless act by his agent, but it is said that the authority of the agent must be conferred by a writing. Gilmer v. Allen, 9 Ga. 208.

[256] Harris v. Shackleford, 6 Tex. 133.

Digitized by Google

property has been levied upon. The bond, if given by them, is binding on them personally, and if forfeited, execution may issue thereon against them.[257] If there are two or more defendants, any one of them whose property is levied upon may give a forthcoming bond. It is not necessary that his codefendants join therein.[258]

It has been held that the bond can be given only to the plaintiff, and if he dies subsequently to the issuing of the writ, there is no authority to take it in his name,[259] nor in that of any other person. Plaintiff indorsed on his fieri facias that the judgment and execution were for the benefit of one H., and the sheriff, after levying the writ, took a forthcoming bond payable to H. Subsequently the bond was forfeited, and judgment was entered and execution awarded upon it. The bond and judgment were quashed on motion, because "the creditor to whom the bond is to be made payable is the person entitled to sue out the execution—the plaintiff on the record. No other person can be known to the officer or to the court itself as the creditor."[260] In Virginia, however, if a plaintiff in whose name a writ is tested dies before its levy, the officer may take a bond in the name of the deceased plaintiff, and it may subsequently be enforced as if he were still living.[261] The statutes differ respecting the person who should be named as obligee in the bond. In some of the states it is required to be in favor of the officer making the levy. If made to the officer when the statute directs it to be made to the plaintiff, it is not a good statutory bond,

[257] Thompson v. Ross, 26 Miss. 198.

[258] Sheppard v. Melloy, 12 Ala. 561; Head v. Beaty, 5 How. (Miss.) 480.

[259] Smith v. Montgomery, 11 Smedes & M. 284.

[260] Meze v. Howver, 1 Leigh, 442.

[261] Turnbull v. Claiborne, 3 Leigh, 392; Entwisle's Ad. v. Bussard, 2 Cranch C. C. 331.

Digitized by Google

though it may amount to a common-law obligation,[262] and an action may be maintained thereon seeking its reformation and its enforcement as reformed.[263]

A forthcoming bond should state the issuing of the execution, the amount for which it issued,[264] and the person whose property has been taken.[265] It need not show at whose instance the levy was made.[266] In Indiana, the bond should contain a provision permitting defendant to sell the property at private sale, and turn over the proceeds to the sheriff. The defendant executing a bond without this provision cannot, on account of its absence, avoid the bond.[267] The bond should correctly describe the execution. For a material variance in this respect it may be quashed,[268] as where it recites a judgment against A, when the judgment offered in support of it is against A and B,[269] or recites an execution against three persons, when the judgment was against four, although since the judgment one of the defendants has died.[270] If the bond is for a greater sum than is due by the execution, the plaintiff may cure this irregularity by remitting the excess.[271] Material variances will not be disregarded.

[262] Agnew v. Leith, 63 Ala. 345.

[263] Bell v. Tanguy, 46 Ind. 49.

[264] Barker v. Planters' Bank, 5 How. (Miss.) 566; Entwisle v. Bussard, 2 Cranch C. C. 331; Ambler v. McMechen, 1 Cranch C. C. 320.

[265] Lewis v. Thompson, 2 Hen. & M. 100; Jones v. Miles, 1 How. (Miss.) 50.

[266] Grady v. Threadgill, 13 Ired. 228.

[267] Patterson v. Brown, 1 Ind. 567; Paul v. Arnold, 12 Ind. 197.

[268] Lunsford v. Richardson, 5 Ala. 618; Russell v. Locke, 57 Ala. 420.

[269] Moffitt v. Mobile Branch Bank, 7 Ala. 593; Holt v. Lynch, 18 W. Va. 567.

[270] Holt v. Lynch, 18 W. Va. 567.

[271] Scott v. Hornsby, 1 Call, 41.

Digitized by Google

It is otherwise where the variance is immaterial, or of but trifling importance.[272] The bond should describe the property taken and agreed to be delivered,[273] and the person to whom the delivery is to be made; but this person need not be expressly named, if he is necessarily inferable from the recitals of the bond.[274] The condition of the bond should be for the delivery of the property on the day of the sale. This day may be specified when it is known at the execution of the bond, or it may, without undertaking to specify any particular day, stipulate that the property shall be delivered to the proper officer at the time fixed for the sale.[275]

If the bond does not substantially comply with the statute, the remedy of the plaintiff, if he does not choose to accept and enforce it as a common-law obligation, is to move to quash it, as where it does not properly describe the property,[276] or the writ under which it was taken.[277]

To be valid the bond must be based upon a levy upon tangible property, such as could be redelivered to defendant after the levy, and such as he could have forthcoming at the sale.[278] The levy must also have been made upon a valid judgment—one that was not

[272] Anderson v. Rhea, 7 Ala. 104; Portis v. Parker, 8 Tex. 23, 58 Am. Dec. 95.

[273] Adler v. Potter, 57 Ala. 571; Tompkins v. Roberts, Litt. Sel. Cas. 12.

[274] Eldridge v. Yantes, 6 Blackf. 73.

[275] Grady v. Threadgill, 13 Ired. 228; Irvin v. Eldridge, 1 Wash. (Va.) 161; Downman v. Chinn, 2 Wash. (Va.) 189; Adler v. Green, 18 W. Va. 201.

[276] Adler v. Potter, 57 Ala. 571.

[277] Johnson v. Carlisle, Sneed (Ky.), 69; Couch v. Miller, 2 Leigh, 545.

[278] Long v. United States Bank, 1 Freem. Ch. 375; Patterson v. Denton, 1 Smedes & M. Ch. 592; Booth v. Kinsey, 8 Gratt. 560.

Digitized by Google

void when entered,[279] nor satisfied by a prior levy, nor otherwise before the levy on which the bond was given.[280]

The parties to a forthcoming bond are said to be estopped from disputing the truth of its recitals.[281] This rule would no doubt prevent their gainsaying the issue of the execution, the levy upon the property, and its return to the possession of the defendant.[282] The bond is, nevertheless, not a waiver of prior irregularities,[283] nor of the right to claim that the property is exempt from execution, [284] or that it does not belong to the defendant,[285] except where, being made by a third person, it contains a direct statement or recital that the property is the property of the defendant.[286] With respect to the waiver of irregularities implied from the giving of a forthcoming bond and the consequent surrender of the property to the defendant, it should be remembered that the generally prevailing rule respecting executions and proceedings thereunder is, that one who wishes to urge a mere irregularity is required to do so promptly on discovering it, or on the happening of acts which would have led to such dis-

[279] Ex parte Cheatham, 6 Ark. 531; Buckingham v. Bailey, 4 Smedes & M. 538.

[280] Miller v. Ashton, 7 Blackf. 29.

[281] Crisman v. Matthews, 1 Scam. 148, 26 Am. Dec. 417; Mead v. Figh, 4 Ala. 279, 37 Am. Dec. 742; Love v. Smith, 4 Yerg. 117; Portis v. Parker, 8 Tex. 23, 58 Am. Dec. 95.

[282] Cawthorn v. McGraw, 9 Ala. 519; Ballard v. Dibrell, 94 Tenn. 229.

[283] Page v. Coleman, 9 Port. 275; Van Cleve v. Haworth, 5 Ala 188.

[284] Perry v. Hensley, 14 B. Mon. 474, 61 Am. Dec. 164; Robards v. Samuel, 17 Mo. 555.

[285] Waterman v. Frank, 21 Mo. 108; Memphis Water Co. v. Magens. 15 Lea, 37.

[286] Sparks v. Shropshire, 4 Bush, 550.

Digitized by Google

covery if he had exercised reasonable diligence in the management of his affairs, and that inaction, after that time, is a waiver of the irregularity. The reasons which support this rule are especially applicable to the giving of forthcoming or delivery bonds. They proceed on the assumption that a levy has been made, and that the officer is entitled to sell the property seized unless payment of the judgment shall be made before the time appointed for the sale, and necessarily lead the plaintiff to discontinue any further effort to levy upon other property and to rest upon the assumption either that all the prior proceedings are legal, or that the defendant intends to waive the irregularities, if any exist. Sound public policy requires that persons who are parties to such bonds, either as principals or sureties, should not, after lulling the plaintiff or the levying officer into inaction and a sense of security, be permitted, subsequently, to urge, for the purpose of avoiding their bonds, any irregularity in any of the prior writs or proceedings, except those which are incapable of waiver.[287]

The sureties may show that they were induced to execute the bond by false misrepresentations made to them to the effect that a levy had been made to which the property was subject. "The contract for suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation or undue advantage taken of the surety by the creditors or their agent, either by

[287] Roswald v. Hobbie, 85 Ala. 73, 7 Am. St. Rep. 23; Bolling v. Vandiver, 91 Ala. 375; Bowden v. Taylor, 81 Ga. 199; Bunnelman v. Wagner, 16 Or. 433, 8 Am. St. Rep. 306; Jacobs v. Daugherty, 78 Tex. 682.

Digitized by Google

surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract." [288]

When a bond is given, and the property is returned to the defendant, it seems no longer to be regarded as in the custody of the law.[289] The sheriff has no further title to it, and no right to maintain any action or to institute any proceedings upon the bond.[290] The defendant may dispose of the property as he sees fit. It may also be taken in execution under other writs in favor of other plaintiffs.[291] But the bond does not release the property so absolutely and irrevocably that the officer cannot levy on it again.[292] After executing the bond, the defendant is bound to use the same degree of care in the management and preservation of the property which would have been exacted of the sheriff if no bond had been given. If the property is lost, stolen, or injured, the defendant and his sureties are not relieved from responsibility, unless they can show an excuse sufficient to relieve a sheriff in like circumstances.[293] It is said that an excuse is furnished by the taking of the property by an officer from the hands of the principal debtor by virtue of a writ in detinue.[294]

[288] Bradley v. Kesee, 5 Cold. 228, 94 Am. Dec. 246.

[289] Biscoe v. Sandefur, 14 Ark. 569. With respect to attachment, it has been held that the giving of a delivery bond does not either dissolve the attachment or release the property from the custody of the law (Dickson v. Black, 32 Or. 217; Kohn v. Henshaw, 17 Or. 308; Drake v. Sworts, 24 Or. 198), and we see no reason for applying a different rule to executions.

[290] Jones v. Jones, 38 Mo. 429.

[291] Jones v. Peasley, 3 Iowa, 52; Biscoe v. Sandefur, 14 Ark. 569.

[292] Brush v. Seguin, 24 Ill. 254.

[293] Trotter v. White, 26 Miss. 88; Bowdoin v. Roberts, 85 Ga. 657; Aycock v. Austin, 87 Ga. 566.

[294] Watson v. Simmons, 91 Ala. 567.

Digitized by Google

The death of a slave or other animal, after the giving of the bond, is a discharge of the liability of the defendant and his sureties to produce it at the sale, provided they did not, by their act or neglect, contribute to such death.[295] The failure to deliver the whole of the property to the officer, at the time and place specified in the bond, is a forfeiture thereof.[296] A surety may, however, be relieved when the nondelivery was occasioned by unavoidable or unforeseen accident.[297]

The return of the execution unsatisfied,[298] and showing that the delivery bond has been forfeited, authorizes the entry of judgment on the bond in those states where any such entry is required. As a general rule, a delivery bond, returned forfeited, of itself operates as a judgment upon which execution may issue against the obligors.[299] This statutory judgment is, in some of the states, a complete merger and satisfaction of the original judgment.[300] In others, it is regarded merely as an additional security, and execution may issue on either judgment until one becomes in fact satisfied.[301]

[295] Phillipi v. Capell, 38 Ala. 575; Haralson v. Walker, 23 Ark. 415; Falls v. Weissenger, 11 Ala. 801.

[296] Gliddens v. Dismukes, 29 Ga. 110; Minor v. Lancashire, 4 How. (Miss.) 347; Hill v. Robinson, 44 Pa. St. 380; Lee v. Moore, 12 Mo. 458; Poteet v. Bryson, 7 Ired. 337; Mapp v. Thompson, 9 Ga. 42; Wright v. Lepper, 2 Ohio, 297.

[297] Chancellor v. Vanhook, 2 B. Mon. 447.

[298] Pelham v. Page, 6 Ark. 148; McKisick v. Brodie, 6 Ark. 375.

[299] Matter of Reardon, 9 Ark. 450; Kelly v. Lank, 7 B. Mon. 220; Brooks v. Harrison, 2 Ala. 209; Jones v. Myrick, 8 Gratt. 179; Gibbs v. Frost, 4 Ala. 720.

[300] Stewart v. Fuqua, 1 Walk. 175; Bell v. Tombigbee Ry. Co., 4 Smedes & M. 549; Chilton v. Cox, 7 Smedes & M. 791; Connell v. Lewis, 1 Walk. 251; Witherspoon v. Spring, 3 How. (Miss.) 60; Joyce v. Farquhar, 1 A. K. Marsh. 20; Douglas v. Twombly, 25 Ark. 124.

[301] Cole v. Robertson, 6 Tex. 356, 55 Am. Dec. 784; Leach v. Williams, 8 Ala. 759; Crawford v. Bank of Mobile, 5 Ala. 55; Branch Bank v. Curry, 13 Ala. 304.

Digitized by Google

Notwithstanding the summary remedy afforded by the statute, a forthcoming or delivery bond may be enforced by an action of debt thereon. The statutory remedy is cumulative. It does not deprive the obligee of his right of action under the form pursued at common law.[302] The reversal of the original judgment necessarily destroys the statutory judgment. The latter rests on the former, and cannot be upheld when its only support is withdrawn.[303] Though it may be the duty of an officer in leaving property in the possession of the defendant after a levy thereon to exact a forthcoming or delivery bond, the failure to do so neither vitiates nor abandons the levy.[304]

§ 265. Delivering Property to a Receiptor.—The practice, after levy, of turning over property to some third person who is willing to become responsible for its custody, prevails in many of the states.[305] The person who assumes this responsibility is usually called a receiptor. He gives to the officer a receipt or bond, in which he acknowledges the fact of the levy, and the delivery of the property to him for safe keeping, and engages to surrender it to the officer on proper demand. He becomes the mere agent or keeper of the officer. His custody is still the custody of the law. The levy

[302] Fossett v. Turnage, 9 Humph. 686; McLain v. Taylor, 9 Ark. 358; English v. Finicey, 5 Blackf. 298.

[303] Hoy v. Couch, 5 How. (Miss.) 188.

[304] Nighbert v. Hornsby, 100 Tenn. 28, 66 Am. St. Rep. 736.

[305] Fowler v. Bishop, 31 Conn. 560; Fitch v. Chapman, 28 Conn. 257; Plaisted v. Hoar, 45 Me. 380; Hinckley v. Bridghan, 46 Me. 450; Waitt v. Thompson, 43 N. H. 161, 80 Am. Dec. 136; Flanagan v. Hoyt, 36 Vt. 565, 86 Am. Dec. 675; Clement v. Little, 42 N. H. 563; Dewey v. Fay, 34 Vt. 138; Carpenter v. Snell, 37 Vt. 255; Cross v. Brown, 41 N. H. 283; Paul v. Burton, 32 Vt. 148; Jewett v. Torrey, 11 Mass. 219; Parker v. Warren, 2 Allen, 187; Hartshorn v. Ives, 4 R. I. 471; Brown v. Gleed, 33 Vt. 147.

Digitized by Google

subsists in as full force as though the property remained in the actual possession of the officer. Hence, no further levy can be made if that under which the receiptor holds was sufficient in value to satisfy the writ.[306] The special property acquired by the officer from his levy continues in his favor. If the property is destroyed or converted, whether by the receiptor or the defendant, or by a stranger to the writ, the officer, by virtue of his special property, may maintain an action of trespass or trover, or for the possession of the property, in case its possession can be obtained.[307] The officer, in contemplation of law, remains in possession of the property. An action for its possession may properly be prosecuted against him,[308] and he is liable for its loss by the negligence or misconduct of the receiptor to the same extent as if the negligence or misconduct were due to himself or his regularly appointed deputies.[309] If the writ was an attachment which is finally dissolved, the defendant looks to the officer for the return of the property; for in contemplation of law it is in his possession, and the receiptor holds merely as his servant, for whose defalcation the officer is answerable.[310]

The receiptor, on the other hand, has no property, general nor special, in the goods in his custody.[311] Having no right of property, it must follow that he can

[306] Hoyt v. Hudson, 12 Johns. 207.

[307] Baker v. Fuller, 21 Pick. 318; Soule v. Austin, 35 Vt. 515.

[308] Chicago etc. R. Co. v. Reid, 74 Mich. 366; Mayhue v. Snell, 37 Mich. 306.

[309] Barrington v. La Corporation Des Huissiers, Rap. Jud. Que. 12 S. C. 284; Torrey v. Otis, 67 Me. 573; Ross v. Libby, 92 Me. 34.

[310] Watkins v. Cawthon, 33 La. Ann. 1194.

[311] Norton v. People, 8 Cow. 137; Dillenback v. Jerome, 7 Cow. 294; Ludden v. Leavitt, 9 Mass. 104, 6 Am. Dec. 45; Commonwealth v. Morse, 14 Mass. 217; Whitter v. Smith, 11 Mass. 211.

Digitized by Google

never, in his capacity as receiptor, have any right of action for converting, injuring, or destroying property. He must surrender possession to the officer on demand. But it is said that no valid demand can be made unless the officer, on his part, has the receipt with him ready to be surrendered when the receiptor's obligation is fulfilled.[312] A very radical difference of opinion exists in reference to the right of a receiptor to exonerate himself from liability by showing that the property did not belong to the defendant, and therefore ought not to be held under the writ. In New York the receiptor is estopped from asserting that the property belonged to himself or to any other stranger to the writ.[313] A like result follows in Maine, where the receipt contains an admission in direct terms that the property is that of the defendant in execution.[314] A deputy sheriff in the state last named, having a writ against a defendant described as trustee, took into his possession certain goods as the property of such defendant, and entrusted them to other persons, taking a receipt therefor stipulating for their delivery on demand, and that the receipt should be "conclusive of their liability under all circumstances, to the officer for the stated value of the goods." He subsequently brought an action upon such receipt, in which action the defense was sought to be interposed that the goods did not belong to the judgment debtor personally, but to an estate of which he was trustee, and, hence, they were not attachable on the writ against him personally, and also that no valid judgment was obtained for want of proper service on

[312] Gilmore v. McNeil, 45 Me. 599.

[313] Cornell v. Dakin, 38 N. Y. 253; People v. Reeder, 25 N. Y. 302; Burrall v. Acker, 23 Wend. 606, 35 Am. Dec. 582; Dezell v. Odell, 3 Hill, 215.

[314] Penobscot Boom Co. v. Wilkins, 27 Me. 345.

Digitized by Google

the defendant in the original action. In overruling this defense, the court said: "As against the terms of their receipt, both of these contentions are unavailing, even if well founded in fact. In either case, the officer would be responsible to some one for the goods—to the lawful owner or custodian. He was entitled to have the goods taken from his receiptor to enable him to respond to any valid claim. The defendants, the receiptors, can avoid their obligation to the officer only by showing that the officer is free from liability to any person on account of his attachment." [315] But according to the preponderance of the authorities, a receipt not containing a direct admission of the defendant's title does not estop the receiptor from asserting his own title, nor from relieving himself by showing that he has delivered the property to a stranger to the writ, who was the true owner.[316] The reasoning on which these cases are based is this: The liability of the receiptor to the officer is contingent, and depends upon the fact of the officer's being liable to some one else. If the property belongs to the receiptor, then the officer is not bound to hold it, nor to have it sold to pay the debt of the defendant. As the officer is not liable in such a case for not selling the property, he has no right to make the receiptor liable for not producing it to be sold. If the goods of a stranger to the suit are seized,

[315] Ross v. Libby, 92 Me. 34.

[316] Learned v. Bryant, 13 Mass. 224; Dewey v. Field, 4 Met. 383, 38 Am. Dec. 376; Burt v. Perkins, 9 Gray, 317; Morse v. Hurd, 17 N. H. 246; Dayton v. Merritt, 33 Conn. 184; Robinson v. Mansfield, 13 Pick. 139; Barron v. Cobleigh, 11 N. H. 557, 35 Am. Dec. 505; Fisher v. Bartlett, 8 Greenl. 122; Lathrop v. Cook, 14 Me. 414, 31 Am. Dec. 62. See Harris v. Morse, 49 Me. 432. 77 Am. Dec. 269; Bursley v. Hamilton, 15 Pick. 40, 25 Am. Dec. 423, and note; Adams v. Fox, 17 Vt. 363; Clement v. Little, 42 N. H. 564; Halbert v. Soule, 57 Vt. 358; Mason v. Aldrich, 36 Minn. 283.

Digitized by Google

the sole liability of the officer for those goods is to the stranger who owns them. If the receiptor delivers them to this stranger, the officer is no longer liable to the stranger, and hence the receiptor should no longer be liable to the officer. The chief vice of this argument, and of the conclusion which it sustains, is, that it permits the receiptor, by giving his receipt, to obtain or retain possession of the property apparently in subordination, but really in hostility, to the writ. It gives the appearance of a valid and sufficient levy, thereby inducing the creditor to forego further measures to collect his debt. When the property actually belonging to the defendant has been taken beyond the reach of process, the receiptor can make his claim to that under levy, and thus render ineffectual all the steps taken by the creditor.

When an officer relinquishes possession to a receiptor, the latter is by his receipt estopped to question the regularity of the judgment or execution, or to deny the delivery to him of the property.[317] The general rule, as we have seen, is, that the receiptor's liability on his receipt depends on the officer's liability to some one else. In the case of the levy of an attachment, the property may at the time be subject to the attachment, but the attachment lien may be terminated by a final judgment against the plaintiff, and in some states by failure to charge the property in execution in due time after a judgment in his favor. In either case, the officer can no longer sustain an action against the receiptor, if the latter has succeeded to the interest of the defendant in attachment, or if, from any reason, the officer is no longer answerable to such de-

[317] Burk v. Webb, 32 Mich. 173.

Digitized by Google

fendant for the return of the property.[318] The lien of the attachment may be divested by proceedings in bankruptcy, instituted in due time. If so, the officer has no right to the property, and the receiver is exonerated from delivering it to him.[319] The receiptor may also defend by showing that the property was exempt from execution, and is in the possession of the judgment debtor, who has never waived his exemption, for in such a case the officer is answerable neither to the judgment creditor nor to the judgment debtor.[320] Mere irregularity in a judgment, execution, or levy[321] does not justify the sheriff in refusing to execute the writ, nor exonerate him from liability to the plaintiff for property received under it. Such irregularity, if any existed, would be waived by the acquiescence or nonaction of the judgment debtor. The receiptor may defend on the ground that the process is void, if the officer is not liable to the owner for its return, as where the writ runs against nobody, and the property belongs to the receiptor.[322] But he cannot exonerate himself from liability to the officer by showing that the judgment was fraudulent,[323] nor by making any collateral attack on the judgment or writ.[324] To establish the defense of an invalid judgment, "it is not enough to show that there were errors and irregularities of a merely formal character in the former proceedings. It must appear that the judgment rendered was

[318] Roberts v. Carpenter, 53 Vt. 678.

[319] Lewis v. Webber, 116 Mass. 450; Wright v. Dawson, 137 Mass. 384; Polley v. Hazard, 70 Vt. 220.

[320] Stone v. Sleeper, 59 N. H. 205; Thayer v. Hunt, 2 Allen, 449.

[321] Hunter v. Peaks, 74 Me. 363; Stevens v. Bailey, 58 N. H. 564.

[322] Halbert v. Soule, 57 Vt. 358.

[323] Brown v. Atwell, 31 Me. 351; Bangs v. Beacham, 68 Me. 425.

[324] Drew v. Livermore, 40 Me. 266; Clifford v. Plumer, 45 N. H. 269.

Digitized by Google

utterly void."[325] There is a class of cases in which the circumstances show that the receipt has been given to avoid a levy upon other property, and where, because of its effect in inducing the officer not to make a levy, and in thereby rendering him liable to the judgment creditor, the receiptor will not be permitted to deny his liability. Thus, the debtor, in order to avoid the levy of a writ, may procure a third person to give the officer a receipt for certain enumerated chattels, irrespective of their existence or ownership. Such a receipt is in the nature of a contract to indemnify the officer for not levying the writ, and estops the receiptor from denying that he received the property, and that it was at the time subject to the writ.[326] And whenever it appears that the receiptor has, by the terms of his receipt or otherwise, given assurance that he has property of a certain value belonging to the defendant, and subject to the writ, and induced the officer not to levy on other property of the defendant, then the receiptor is estopped by his receipt from asserting title in himself.[327]

§ 266. **The Inventory.**—When a levy is made, it is the duty of the officer to make an inventory of the property levied upon.[328] This is for the purpose of affording means, at any subsequent time, of showing what it is that has been seized and is held for the satisfaction of the judgment. If, from the inattention of the sheriff to this duty, any loss should result to either

[325] Bean v. Ayers, 70 Me. 421.

[326] Lewis v. Webber, 116 Mass. 450.

[327] Bacon v. Daniels, 116 Mass. 476; Dewey v. Field, 4 Met. 381, 38 Am. Dec. 376.

[328] Haggerty v. Wilber, 16 Johns. 287, 8 Am. Dec. 321; Beekman v. Lansing, 3 Wend. 446, 20 Am. Dec. 707; Bond v. Willett, 1 Keyes, 381.

Digitized by Google

plaintiff or defendant, the officer would be liable to compensate them for all damages sustained.[329] While, for the purpose indicated, it is the duty of an officer to make an inventory, the nonperformance of this duty has no other result than to make him liable in damages. For it seems now to be established beyond dispute that while an inventory is always proper, yet it is never indispensable to the validity of a levy.[330] Perhaps an exception to this rule obtains where the statute expressly directs an inventory to be made, and the levy relied upon is constructive merely, no possession of the property having been taken.[331]

§ 267. Levy under Second Writ.—When an officer once seizes upon property, it is thereby placed in custody of the law. Writs may thereafter come to the hands of the same officer for service. If so, as the property is already in his custody, there is no reason why he should attempt, by any further act, to place it in his custody under the second writ. For when goods are held under one writ, they are also held under all other writs that may come to the hands of the same officer. The mere receipt of a second execution operates as a levy of the property already in the officer's hands under a former writ. No other nor further act of seizure is necessary.[332] A difference of opinion ex-

[329] Toulmin v. Lesesne, 2 Ala. 361.

[330] Roth v. Wells, 29 N. Y. 485; Bond v. Willett, 31 N. Y. 102; Pugh v. Calloway, 10 Ohio St. 489; Wood v. Vanarsdale, 3 Rawle, 401; Watts v. Cleaveland, 3 E. D. Smith, 553; Weidensaul v. Reynolds, 49 Pa. St. 73; Ferguson v. Washer, 49 Mich. 390; State v. Martin, 51 N. J. L. 148.

[331] State v. Martin, 51 N. J. L. 148.

[332] Cahn v. Person, 56 Miss. 360; Leach v. Pine, 41 Ill. 65, 89 Am. Dec. 375; State v. Doan, 89 Mo. 44; Turner v. Austin, 16 Mass. 181; Bank of Lansingburgh v. Crary, 1 Barb. 542; Van Winkle v. Udall, 1 Hill, 559; Slade v. Van Vechten, 11 Paige, 21; Cresson v. Stout,

Digitized by Google

ists whether the mere receipt of a second execution by an officer who has levied the first operates ipso facto as a constructive levy upon the same property. An officer who held personal property under attachment received, while it was in his custody, an execution based on a judgment against the same defendant. He endorsed on this writ the date of its receipt, and subsequently returned it with the further endorsement that he found no property liable to its satisfaction. The judgment creditor subsequently intervened in the cause, and moved for the discharge of the original attachment. The question was thus presented, whether there had been a levy of the execution so as to entitle the judgment creditor to contest the validity of the attachment. One of the judges was of opinion that, though the sheriff testified he had never levied the execution, yet that the receipt of the writ operated as a constructive levy of the property held by the same officer under the prior writ; but the majority of the court maintained "that something more is required, and that there must be some act of the officer professing or indicating his purpose to hold the property under the second or subsequent writ," and that, although it was the duty of the sheriff to have levied the writ, yet that, not having done so, "the execution creditor cannot hold the property, but must resort to his remedy against the officer." [333]

17 Johns. 116; McCormick v. Miller, 3 Penr. & W. 230; Watmough v. Francis, 7 Pa. St. 206; Jones v. Atherton, 2 Marsh. 375; 7 Taunt. 56; Sawle v. Paynter, 1 Dowl. & R. 307; Wintle v. Freeman, 11 Ad. & E. 539; 1 Gale & D. 93; Wintle v. Chetwynd, 7 Dowl. P. C. 554; 1 W. W. & H. 581; Field v. Macullar, 20 Ill. App. 392; Brown v. Loesch, 3 Ind. App. 145; State v. Curran, 45 Mo. App. 142; Penland v. Leatherwood, 101 N. C. 509, 9 Am. St. Rep. 38; Meacham A. Co. v. Strong, 3 Wash. Ter. 61.

[333] Bank of Santa Fe v. Haskell Co. Bank, 59 Kan. 354.

Digitized by Google

The goods, by virtue of the levy, are put in custody of the law, the consequence of which is that they cannot be seized or levied upon by another officer. Nor can a sheriff in whose possession they are, under a levy made by him, make any valid agreement to hold the property, after satisfying his own writ, for the benefit of another writ then in the hands of a constable. If such an agreement is made, the property will, nevertheless, be subject to the next writ against the defendant which may happen to come into the hands of the sheriff.[334] In the city of Chicago, by the statute of 1861, an officer was created, called the "custodian." It was his duty to receive goods levied upon by other officers, to keep them in safety, to sell them, and to make return of the proceeds of the sale to the officer from whom the goods were received. Under this act, when an officer, after making a levy and turning over the goods to the possession of the custodian, received another writ against the same defendant, the receipt of such writ did not operate as a constructive levy. In this case the property had passed out of the possession of the officer. It was necessary for him to go to the property, to make a formal levy in view thereof, and to inform the custodian of what he had done.[335]

It is, of course, essential to the maintenance of a second or constructive levy that the levy made, or attempted to be made, under the prior writ be a valid and enforceable levy when the second writ is received. If the preceding levy has been abandoned or waived, or the circumstances connected with it are such as to show that it is infected with fraud, actual or constructive, and is hence nonenforceable, it does not have suf-

[334] Townsend v. Corning, 40 Ohio St. 335.
[335] Chittenden v. Rogers, 42 Ill. 100.

Digitized by Google

ficient validity to support a subsequent levy based upon it, but not accompanied with an actual seizure of the property.[336] If, after a levy upon personal property, it is taken from the possession of the levying officer in an action of replevin or of claim and delivery, it is not subject to writs subsequently coming into his hands, unless an actual levy is made thereunder.[337]

We have shown that personal property levied upon is placed in the custody of the law, and that the court by whose process it is held will not permit the possession of its officer to be disturbed by any further and hostile levy.[338] The result of this is, that after a levy is made by one officer, no subsequent levy can be made by another. In a few of the states, however, this rule does not prevail. While the officer first levying cannot be deprived of the possession of the property, a constructive levy thereon may be made, which so far binds him and the property that, when notified thereof, it is his duty, after satisfying the writ first levied, to hold any residue of the property, or of its proceeds, for the satisfaction of the second writ, or to turn such property over to the officer levying that writ.[339]

§ 268. The Effect of a Levy upon the Title to the Property.—The lien of an execution gives the officer intrusted with its service no general or special property in the defendant's goods. The goods may be destroyed or removed from the reach of the writ without giving

[336] Murphy v. Swadener, 33 Ohio St. 85; Brazier v. Thomas, Busb. L. (N. C.) 28.

[337] Merrill v. Wedgewood, 25 Neb. 283.

[338] Ante, § 135.

[339] State v. Curran, 45 Mo. App. 142; Patterson v. Stephenson, 77 Mo. 329; Penland v. Leatherwood, 101 N. C. 509, 9 Am. St. Rep. 88.

Digitized by Google

the officer any right of action against any one.[340] But the moment that a levy is made the rights and remedies of the officer are materially changed; or, more accurately speaking, he, from that moment,[341] is vested with rights and entitled to remedies to which he could before urge no valid claim. If the property increases or changes in form while under a levy, the officer is entitled to retain such increase or the property in its changed form, and, if his levy is upon a mare with foal, her colt, when born, is subject thereto.[342]

The officer is entitled to retain such possession and control of the property as may be necessary to make it productive under the writ. The law, therefore, concedes to him as to a bailee a special property in the goods in his custody. It gives him all the legal remedies needed to maintain his rights, and to secure him indemnity for their invasion. If the property is taken from him, or if, being left by him in the possession of another, it is taken from such possession by any one or is converted by the custodian, the officer may sustain an action of replevin, trespass, or trover, just as the owner of an absolute title could do in like circumstances.[343] He may maintain either of these actions

[340] Hotchkiss v. McVickar, 12 Johns. 405. See ante, § 196.

[341] Haywood v. Sledge, 3 Dev. 338; Lyon v. Steuart, 5 J. J. Marsh. 676; Clement v. Garland, 53 Me. 427.

[342] Talbot v. Magee, 59 Mo. App. 347.

[343] Bean v. Schmidt, 43 Minn. 505; Horgan v. Lyons, 59 Minn. 217; Fellows v. Wadsworth, 62 N. H. 26; Parker v. Dean, 45 Miss. 408; Wright v. Lepper, 2 Ohio, 297; Garner v. Willis, Breese, 368; Hartwell v. Bissel, 17 Johns. 128; Palmer v. People, 10 Wend. 165, 25 Am. Dec. 551; Dunkin v. McKee, 23 Ind. 447; Benson v. Berry, 55 Barb. 620; Rhoads v. Woods, 41 Barb. 471; Lockwood v. Bull, 1 Cow. 322; Blackley v. Sheldon, 7 Johns. 32; Howland v. Willetts, 9 N. Y. 170; Addison v. Crow, 5 Dana, 275; Rogers v. Darnaby, 4 B. Mon. 241; State v. Page, 1 Har. & J. 475; Barker v. Miller, 6 Johns. 196; Wilbraham v. Snow, 2 Saund. 47; 1 Mod. 30; Lathrop

Digitized by Google

against the defendant as well as against a stranger to the suit.[344] An officer does not, however, acquire any greater interest in the property or any better right to its possession than the defendant in the writ had. If he held the property merely as agent of another, to whom he subsequently delivered it, the officer cannot recover possession thereof from the owner, if the latter is entitled to the possession as between him and the defendant in the writ.[345]

The officer's title is dependent for its continuance upon the continuing of the necessity of holding the property to answer the purposes of the writ. If the judgment should be satisfied, or if from any cause it should cease to be in force, or if the levy should be set aside, the officer would no longer have the right to withhold possession from the defendant. As against the general owner, the special property of the officer would be terminated;[346] but, as against strangers to the title, the special property continues until the officer can redeliver the property to the defendant.[347]

v. Blake, 3 Fost. 46; Barker v. Mathews, 1 Den. 335; Marsh v. White, 3 Barb. 518; Rives v. Porter, 7 Ired. 74; Casher v. Peterson, 1 South. 317; Malone v. Abbott, 3 Humph. 532; Blades v. Arundale, 1 Maule & S. 711; Hankins v. Kingsland, 2 Hall, 425; Evans v. Barnes, 2 Swan, 292; Hill v. Haynes, 9 Alb. L. J. 276; Norton v. People, 8 Cow. 137; Dillenback v. Jerome, 7 Cow. 297. Where property, while under levy, was destroyed by fire, the defendant in execution was judged to be the proper person to sue for insurance recoverable therefor. Franklin F. Ins. Co. v. Findlay, 6 Whart. 483.

[344] Williams v. Herndon, 12 B. Mon. 484, 54 Am. Dec. 551; Weatherly v. Covington, 3 Strob. 27, 49 Am. Dec. 623; Martin v. Watson, 8 Wis. 315.

[345] The Bonnie Doon, 36 Fed. Rep. 770.

[346] Walpole v. Smith, 4 Blackf. 304; Bates v. Gest, 3 McCord, 493; Banker v. Caldwell, 3 Minn. 94.

[347] McClintock v. Graham, 3 McCord, 243.

Digitized by Google

It must be remembered that the special property of the officer has no further existence or effect than is necessary to obtain the end sought by the levy of the writ. The general property subject to these purposes remains in the defendant. He may, therefore, as before the levy, convey the title to the property; the only difference being, that, after the levy, the title received by the vendee is liable to be divested by sale under the levy.[348]

The plaintiff, by virtue of the levy, does not acquire any title to the property seized.[349] As the title to the property is not divested by the levy, it follows that if the property of a third person is levied upon, but is left within his possession and control, where it is destroyed by fire without the fault either of the plaintiff or the levying officer, no action can be sustained against either, if the owner had not, before its destruction, elected to treat the property as converted by the levy thereon.[350]

After the levy, the officer has, it is true, a lien upon the property, by means of which he is enabled to sell it, and to appropriate the proceeds to the satisfaction of his debt. It would not be possible for the plaintiff to sustain any action of trespass, trover, or replevin, if the goods should be destroyed or converted while held under the levy. Whether he can sustain any action of

[348] Atwood v. Pierson, 9 Ala. 656; Bates v. Moore, 2 Bail. 614; Warner v. Everett, 7 B. Mon. 266; Addison v. Crow, 5 Dana, 271; Banker v. Caldwell, 3 Minn. 94; Fuller v. Loring, 42 Me. 481; Rice v. Tower, 1 Gray, 426; Folsom v. Chesley, 2 N. H. 432; Alexander v. Springs, 5 Ired. 475; Churchill v. Warren, 2 N. H. 298, 9 Am. Dec. 73; Popelston v. Skinner, 4 Dev. & B. 156; Starr v. Moore, 3 McLean, 354; Samuel v. Duke, 3 Mees. & W. 622; Pierce v. Kingsmill, 25 Barb. 631.

[349] Walker v. Commonwealth, 18 Gratt. 13, 98 Am. Dec. 681.

[350] Sammis v. Sly, 54 Oh. St. 511, 56 Am. St. Rep. 781.

Digitized by Google

any character whatever is doubtful. In the case of Barker v. Mathews,[351] which was an action on the case for carrying away and secreting certain property which had been levied upon by virtue of an execution in favor of the plaintiff, it was held that the plaintiff could have no action for the alleged injury. But this decision has been doubted, and perhaps overruled, by later adjudications in the same state.[352] The lien vested in plaintiff by the levy, while it does not confer an immediate right of possession, has been held to constitute a vested right of property, which subsequent legislation was powerless to destroy or impair. "Indeed," said the court of errors and appeals of New Jersey, "a right partaking of the nature of property, such as became vested in the iron and coal company, upon the levy of its execution, is clearly within the principle of the constitutional provision which protects private property from legislative action, and forbids its being taken without compensation for either public or private purposes. This constitutional protection is thrown around property of every kind and description, and is not restricted to any particular mode of taking."[353]

Another consequence of taking property under execution is, that it is put in custody of the law, and cannot be levied upon by any other officer, nor can it be replevied from the officer in whose charge it is by the defendant, nor by any one claiming title under him subsequent to the levy.[354] It has sometimes been de-

[351] 1 Denio, 335.

[352] Marsh v. White, 3 Barb. 518; Howland v. Willetts, 9 N. Y. 170.

[353] Williamson v. N. J. South. R. R., 29 N. J. Eq. 334.

[354] Cromwell v. Owings, 7 Har. & J. 55; Burket v. Boude, 3 Dana, 213; Rives v. Wilborne, 6 Ala. 45; Kemp v. Porter, 7 Ala. 138; Langdon v. Brumby, 7 Ala. 53; McLemore v. Benbow, 19 Ala. 76; Hartwell v. Bissell, 17 Johns. 128; Bilby v. Hartman, 29 Mo. App. 125.

Digitized by Google

cided that property levied upon by an officer could not be replevied even by a stranger to the writ.[355] But it is now well settled that property cannot, at least as against third persons, be placed in custodia legis by an unauthorized levy. A writ of execution does not command the officer to levy on the goods of a stranger to the action. On the contrary, it affords no justification for an interference with any property other than that of the defendant. When the levy is made the goods are so far in the custody of the law that the defendant cannot maintain an action to recover them from the officer, nor could any other person maintain such an action by means of title derived from the defendant after the levy. But if the property was not the defendant's, it is not in custody of the law as against the claims of the true owner. The custody of the sheriff, in such a case, is a wrongful, and not a legal, custody. Therefore the owner may recover from him in replevin.[356] The lien created by the levy, like the mere lien of the execution,[357] has no power to protract the life of the judgment lien. If the sale does not take place until after the time limited by statute as the duration of the judgment lien, the purchaser's title, except in Missouri,[358] is subordinate to all conveyances

[355] Cromwell v. Owings, 7 Har. & J. 55; Kittredge v. Holt, 1 L. & Eq. Reporter, 88.

[356] Williams v. Ringgold, 4 Cranch C. C. 57; Thompson v. Button, 14 Johns. 84; Dunham v. Wyckoff, 3 Wend. 280; Hall v. Tuttle, 2 Wend. 475; Judd v. Fox, 9 Cow. 259; Rogers v. Weir, 34 N. Y. 463; Emerson v. Bleakley, 5 Abb. Pr., N. S., 365; Clark v. Skinner, 20 Johns. 465, 11 Am. Dec. 302; Mulholm v. Cheney, Addis. 301.

[357] See ante, § 205.

[358] Durrett v. Hulse, 67 Mo. 201; Horn v. Ross, 20 Ga. 210, 65 Am. Dec. 621; Oliver v. State, 64 Ga. 480; Chandler v. Higgins, 109 Ill. 602; Lindley v. Kelley, 42 Ind. 294; Friyer v. McNaughton, 110 Mich. 22; North Western Bank v. Hayes, 37 W. Va. 475. Respecting satisfaction resulting from the garnishment of a debt: See Doughty v. Meek, 105 Ia. 16, 67 Am. St. Rep. 282.

Digitized by Google

and encumbrances in existence immediately preceding the levy.[359]

§ 269. Effect of Levy as a Satisfaction of the Writ.—Levy upon personal property sufficient in value to satisfy the execution is frequently said to operate per se as an extinguishment of the judgment, and consequently as a satisfaction of the execution.[360] In regard to the effect of such a levy, there is no substantial conflict of opinion, though the judges have differed somewhat from one another in describing this effect and the means by which it is produced. None of the decisions assume that a levy produces any absolute satisfaction. It is a satisfaction sub modo; the levy must be fairly exhausted before further proceedings can be taken, and while these proceedings are going on the plaintiff cannot have another execution, nor sue on the judgment, nor redeem lands under it.[361]

After the levy, if the sheriff wastes the property, or it is lost or destroyed through his neglect or misconduct, or that of the plaintiff, the satisfaction is abso-

[359] Spicer v. Gambill, 93 N. C. 378, and cases cited ante, § 205; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338.

[360] Webb v. Bumpass, 9 Port. 201, 33 Am. Dec. 310; Campbell v. Spence, 4 Ala. 543, 39 Am. Dec. 301; Blair v. Caldwell, 3 Mo. 353; Trigg v. Harris, 49 Mo. 176; Ex parte Lawrence, 4 Cow. 417; Farmers' & M. Bank v. Kingsley, 2 Doug. (Mich.) 379; Young v. Read, 3 Yerg. 297; Hogshead v. Carruth, 5 Yerg. 227; Campbell v. Pope, Hemp. 271; Cass v. Adams, 3 Ohio, 223; Reynolds v. Rogers, 5 Ohio, 169; People v. Chisholm, 8 Cal. 29; Troup v. Wood, 4 Johns. Ch. 228; Smith v. Hughes, 24 Ill. 270; Martin v. Carter, 27 Ill. 294; Carr v. Weld, 19 N. J. Eq. 319; Hoyt v. Hudson, 12 Johns. 207.

[361] Ex parte Lawrence, 4 Cow. 417; First Nat. Bank v. Rogers, 13 Minn. 407, 97 Am. Dec. 239; Mountney v. Andrews, Cro. Eliz. 237; Green v. Burke, 23 Wend. 501; McIntosh v. Chew, 1 Blackf. 289; Frank v. Brasket, 44 Ind. 92.

Digitized by Google

lute.[362] If, without any fault of the plaintiff or of the sheriff, the levy does not produce proceeds sufficient to satisfy the execution, then the plaintiff is entitled to proceed for so much as remains unpaid, as if no levy had been made.[363] If, after levy upon sufficient personal property, the court orders that the judgment be not enforced, the order releases the levy, but does not discharge the judgment.[364] Where the property is never taken from the possession of the defendant,[365] or where, after being so taken, it is restored to him at his request, or by some act for which he is responsible, or in which he acquiesces, the levy does not operate as a satisfaction, so far, at least, as his rights are concerned.[366] If the plaintiff or the levying officer discov-

[362] Pickens v. Marlow, 2 Smedes & M. 428; Ladd v. Blunt, 4 Mass. 402; Peck v. Tiffany, 2 N. Y. 451; Wood v. Torrey, 6 Wend. 562; People v. Onondaga C. P., 19 Wend. 79; Trenary v. Cheever, 48 Ill. 28; Webb v. Bumpass, 9 Port. 201, 33 Am. Dec. 310; Carroll v. Fields, 6 Yerg. 305; Williams v. Gartrell, 4 G. Greene, 287; Morrow v. Hart, 1 A. K. Marsh. 292; Kershaw v. Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70; Hoard v. Wilcox, 47 Pa. St. 51; Harmon v. State, 82 Ind. 197; Kenrick v. Huff, 71 Mo. 570.

[363] Barret v. Thompson, 5 Ind. 457; Voorhees v. Gros, 3 How. Pr. 262; Summerhill v. Trapp, 48 Ala. 363; People v. Hopson, 1 Denio, 574; Curtis v. Root, 28 Ill. 367; Banta v. McClennan, 1 McCart. 120; Mickles v. Haskin, 11 Wend. 125; Bank of Tennessee v. Turney, 7 Humph. 271; Starr v. Moore, 3 McLean, 354.

[364] Mulford v. Estudillo, 32 Cal. 131.

[365] Cravens v. Wilson, 48 Tex. 324; Rhea v. Preston, 75 Va. 757; Garner v. Cutler, 28 Tex. 176.

[366] Mickles v. Haskin, 11 Wend. 125; Holbrook v. Champlin, Hoff. Ch. 148; Cooley v. Harper, 4 Ind. 454; Williams v. Bowdon, 1 Swan, 283; Porter v. Boone, 1 Watts & S. 251; United States v. Dashiel, 3 Wall. 688; Smith v. Hughes, 24 Ill. 270; People v. Hopson, 1 Denio, 574; Ford v. Skinner, 4 Ohio, 378; In re King, 2 Dev. 341; Barber v. Reynolds, 44 Cal. 520; Wade v. Watt, 41 Miss. 248; Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309; Blackburn v. Jackson, 26 Mo. 308; Waddell v. Elmendorf, 5 Denio, 447; Ostrander v. Walter, 2 Hill, 329; Crawford v. Bank, 5 Ala. 55; Cummin's Appeal, 9 Watts & S. 73; Young v. Cleveland, 33 Mo. 126, 82 Am. Dec. 155;

Digitized by Google

ers that, for some reason, the levy cannot be maintained if objected to, as where the writ is irregular or the levy has been made by an officer not authorized to make it, the authorities indicate that it is not necessary to maintain the levy until the objection is actually made and the writ or the levy vacated, but that the levy may be at once abandoned and the property surrendered to the defendant, and the apparent or conditional satisfaction of the judgment thereby terminated.[367]

When third persons, as sureties, are collaterally liable, the release of the levy cannot revive the judgment as to them;[368] and in general, so far as the rights of third persons are concerned, whether they are sureties or the holders of junior liens, or otherwise interested in the discharge of the writ, the levy upon goods is a satisfaction of the judgment to the extent of their value, unless plaintiff is deprived of the benefit of his levy, without any fault, neglect, or indulgence on his part, or on the part of the officer.[369] If there are sure-

Stone v. Tucker, 2 Bail. 495; Binford v. Alston, 4 Dev. 351; Duncan v. Harris, 17 Serg. & R. 436; Ontario Bank v. Hallett, 8 Cow. 192; Biscoe v. Sandefur, 14 Ark. 568; Chandler v. Higgins, 109 Ill. 602; Baker v. Mansur etc. Co., 67 Ill. App. 357; Bennett v. McGrade, 15 Minn. 132; Conway v. Wilson, 44 N. J. Eq. 457.

[367] Ezra v. Manlove, 7 Blackf. 389; Green v. Burke, 23 Wend. 490; Bole v. Bogardis, 86 Pa. St. 37; McKeeby v. Webster, 170 Pa. St. 624.

[368] Mulford v. Estudillo, 23 Cal. 94; Howerton v. Sprague, 64 N. C. 451.

[369] Hayden v. Auburn Prison, 1 Sand. Ch. 195; Bank v. Fordyce, 9 Pa. St. 275, 49 Am. Dec. 561; Campbell v. Spence, 4 Ala. 543, 39 Am. Dec. 301; Brown v. Riggins, 3 Ga. 405; Mulford v. Estudillo, 23 Cal. 94; Curan v. Colbert, 3 Ga. 239, 46 Am. Dec. 427; Morley v. Dickinson, 12 Cal. 561; Commercial Bank v. W. R. Bank, 11 Ohio, 444, 38 Am. Dec. 739; Lynch v. Pressley, 8 Ga. 327; La Farge v. Herter, 9 N. Y. 241; Chisholm v. Chittenden, 45 Ga. 213; Jones v. Bullock, 3 Bibb. 467; Truitt v. Ludwig, 25 Pa. St. 145; Talmadge v. Burlingame, 9 Pa. St. 21; Lyon v. Hampton, 20 Pa. St. 46; Hunt v. Breading, 12 Serg. & R. 87, 14 Am. Dec. 665; Finley v. King, 1

Digitized by Google

ties for the payment of the debt for which the writ issued, its levy operates as a satisfaction in their behalf, of the benefit of which they cannot be deprived through the fault of the plaintiff or the officer. Hence, a release of the levy without their assent relieves them of their obligation as sureties,[370] unless the release is without the concurrence of the plaintiff,[371] as where it is accomplished by giving an undertaking on appeal,[372] or a forthcoming and delivery bond.[373]

It is apparent that the satisfaction, if such it may be called, produced by a levy on personal property, is liable to be removed by a variety of circumstances. Therefore, it is probable that the term "suspension" is more applicable to the effect of such a levy than the term "satisfaction." Thus Chief Justice Bronson, in People v. Hopson,[374] said: "If the broad ground has not yet been taken, it is time it should be asserted that a mere levy on sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain action on the judgment, nor use it for the purpose of becoming a redeeming creditor. The mere levy neither gives anything to the creditor, nor takes anything from the debtor. It

Head, 123; Voorhees v. Gros, 3 How. Pr. 262; Ford v. Commissioners, 7 Ohio, 492.

[370] Finley v. King, 1 Head, 123; Howerton v. Sprague, 64 N. C. 451; La Farge v. Herter, 4 Barb. 346; 9 N. Y. 241; Mulford v. Estudillo, 23 Cal. 94.

[371] Summerhill v. Trapp, 48 Ala. 363.

[372] Fry v. Manlove, 1 Baxt. 256; Bennett v. McGrade, 15 Minn. 132; First Nat. Bank v. Rogers, 13 Minn. 407, 97 Am. Dec. 239.

[373] Ambrose v. Root, 11 Ill. 488, 52 Am. Dec. 456.

[374] 1 Denio, 574.

Digitized by Google

does not divest title. It only creates a lien on the property."[375] But the distinctions here taken show a difference in the choice of terms in which to convey the same idea, rather than any material difference of opinion. By whatever term we designate the result of a levy on personal property, and from whatever cause that result is thought to proceed, the result remains the same.

The levy upon and taking possession of goods sufficient to pay the judgment is prima facie a satisfaction of the execution, and casts upon the party who made such a levy, before he can proceed further, the onus of establishing that, from no fault of his or of the officer's, or from some act or consent of the defendant, the levy has not proved productive of a complete satisfaction.[376] If the evidence shows merely that personal property has been levied upon, and there is nothing tending to show what was its value, it is doubtful whether any presumption of satisfaction can be indulged. The authorities upon the subject are meager and inconclusive, but they apparently support the proposition that he who claims that the levy operated as a satisfaction of a judgment or a suspension of the right to issue execution thereon,

[375] People v. Hopson, 1 Denio, 574. See, to same effect, United States v. Dashiel, 3 Wall. 688; Whiting v. Beebe, 12 Ark. 421; Banta v. McClennan, 1 McCart. 120; French v. Snyder, 30 Ill. 343, 83 Am. Dec. 193; Peck v. Tiffany, 2 N. Y. 451; Lynch v. Pressley, 8 Ga. 327; McBride v. Farmers' Bank, 7 Abb. Pr. 347; Denvrey v. Fox, 22 Barb. 522; Ambrose v. Weed, 11 Ill. 488; Trenary v. Cheever, 48 Ill. 28; Doe v. Dutton, 2 Ind. 309; Williams v. Gartrell, 4 G. Greene, 287; Alexander v. Polk, 39 Miss. 737; Morrow v. Hart, 1 A. K. Marsh. 292; Pickens v. Marlow, 2 Smedes & M. 428; Peploe v. Galliers, 4 Moore C. P. 163.

[376] Carr v. Weld, 19 N. J. Eq. 319; Farmers' & M. Bank v. Kingsley, 2 Doug. (Mich.) 379; Chisholm v. Chittenden, 45 Ga. 213; McIntosh v. Chew, 1 Blackf. 289; Lucas v. Cassaday, 2 G. Greene, 208; First Nat. Bank v. Rogers, 15 Minn. 381, 13 Minn. 407, 97 Am. Dec.

Digitized by Google

must assume the burden of proving that the value of the property levied upon was such that it might have produced a satisfaction of the judgment.[377]

For the purpose of proving that a levy has not operated as a satisfaction of his judgment, the plaintiff may show that the property has without his fault been taken from him or from the officer by legal process.[378] If it was taken under process which gave no sufficient authority to take it, the rule probably does not prevail, unless the property is restored to defendant. It would seem to be the duty of the officer to resist such process.[379] The property may be taken out of the officer's hands pursuant to a forthcoming and delivery bond given by or on behalf of the defendant. In those states where the forfeiture of such a bond does not extinguish or merge the original judgment, the levy which the bond was given to release does not operate as a satisfaction.[380] The presumption of satisfaction may be rebutted without showing the restoration of the property to defendant's possession, by proving that it was sold and did not in fact produce a satisfaction, either because the proceeds were inadequate or were

239; Brown v. Kidd, 34 Miss. 291; Peale v. Bolton, 24 Miss. 630; Shelton v. Hamilton, 23 Miss. 496, 57 Am. Dec. 149; Ford v. Skinner, 4 Ohio, 378; Ordinary v. Spann, 1 Rich. 429; Mayson v. Day, 1 Rich. 435; Peay v. Fleming, 2 Hill Ch. 97; Bingaman v. Hyatt, 1 Smedes & M. Ch. 437; Barret v. Thompson, 5 Ind. 457; Frank v. Brasket, 44 Ind. 92; Lindley v. Kelley, 42 Ind. 294; Bennett v. McGrade, 15 Minn. 132; Allen v. Johnson, 4 J. J. Marsh. 236.

[377] Fuller v. Watkins, 11 Heisk. 489.

[378] Alexander v. Polk, 39 Miss. 737; Bean v. Seyfert, 12 Phila. 224; Banks v. Evans, 10 Smedes & M. 35, 48 Am. Dec. 734.

[379] State v. Six, 80 Mo. 60.

[380] Hopkins v. Land, 4 Ala. 427; Walker v. Bradley, 2 Ark. 578; Curtis v. Root, 28 Ill. 367; Walker v. McDowell, 4 Smedes & M. 118, 43 Am. Dec. 476; Parker v. Jones, 5 Jones Eq. 276, 75 Am. Dec. 441; Cole v. Robertson, 6 Tex. 356.

Digitized by Google

properly applied to the extinguishment of prior liens,[381] or were, with the assent of the defendant, applied to junior liens.[382] The case of slaves becoming emancipated after being levied upon furnishes another example of a levy proving insufficient without any fault of the plaintiff or the officer.[383] If there are two or more defendants, it seems that the levy upon the chattels of one of them cannot be urged as a satisfaction by or on behalf of the others, until the property levied upon has been sold under the writ.[384] We have already intimated that the satisfaction produced by a levy on chattels could not be avoided against the wish of the defendant, by any act or fault of the officer. The result of this rule is to make the officer the agent of the creditor, and to visit on the latter the consequences of the former's neglect and malfeasance, unless indemnity can be found by an action against the officer and his sureties. The loss arising from an accident to the chattels for which the officer is not blamable falls on the defendant.[385] But if he wastes them, converts them to his own use, or misappropriates or misapplies their proceeds, the defendant is entitled to be credited with their value or amount, toward the satisfaction of the writ.[386] Whether a levy under attachment, made upon chattels which are taken into the possession of the sher-

[381] Peay v. Fleming, 2 Hill Ch. 97; Newsom v. McLendon, 6 Ga. 392; Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309.

[382] Barber v. Reynolds, 44 Cal. 520.

[383] McElwee v. Jeffreys, 7 S. C. 228; Wade v. Watt, 41 Miss. 248.

[384] Walker v. Bradley, 2 Ark. 578; McGinnis v. Lillard's Ex'r, 4 Bibb. 490; Churchill v. Warren, 2 N. H. 298, 9 Am. Dec. 73; Binford v. Alston, 4 Dev. 351.

[385] Starr v. Moore, 3 McLean, 354.

[386] Hanness v. Bonnell, 23 N. J. L. 159; Ladd v. Blunt, 4 Mass. 402; Fuller v. Loring, 42 Me. 481; Walker v. Commonwealth, 18 Gratt. 13, 98 Am. Dec. 631; Harris v. Evans, 81 Ill. 419.

Digitized by Google

iff, and which are, or at least should be, retained in such possession, to be applied in satisfaction of the judgment, constitutes a pro tanto satisfaction of the judgment, is as yet uncertain. We think the better opinion is, that it is such a satisfaction, and that if the property is wasted or misappropriated by the sheriff the loss falls upon the plaintiff.[387]

§ 269 a. Levies Affected by Fraud or Unlawful Acts or Devices.—A levy may be perfect in every respect, except that to its consummation some unlawful act has contributed. The questions then arising are, May defendant treat this levy as void? or must he seek redress by some action against the wrongdoer for damages flowing from the unlawful act? and if he does proceed by such action, may the fact that the officer was proceeding under a valid writ be urged either as a defense to the action or in mitigation of damages? When the unlawful act consisted of forcing the outer door of the defendant's dwelling, and thereby effecting a seizure of his chattels, the officer, as we have shown,[388] is, according to the American authorities, neither entitled to the protection of his process as a defense nor in mitigation of damages; and the defendant may treat the levy as void, and recover possession of the property. There can be no adequate protection against levies accomplished by fraudulent tricks and devices and other unlawful acts, except by declaring that therefrom the plaintiff shall gain no advantage whatsoever; and that this is true our courts have fully realized. Where a

[387] Yourt v. Hopkins, 24 Ill. 326; Kendrick v. Huff, 71 Mo. 570. See McBride v. Farmers' Bank, 28 Barb. 476; 7 Abb. Pr. 347; Maxwell v. Stewart, 22 Wall 80.

[388] Ante, § 256.

Digitized by Google

sheriff, while in a county in which he had no authority to act, pretended that he had a writ of attachment, and was entitled to seize property under it, and thereby got possession of such property and took it into the county of which he was sheriff, and there levied upon it, the attachment was released by the court upon motion. The court said: "The facts disclose a great abuse of the law and of the name of its process, and of the authority of its officer. Under the pretense of having a writ, one who was an officer in another county took the property and carried it back a hundred miles or thereabouts, in order that he might bring it within reach of legal process. The persons concerned submitted to what they were led to believe was the command of the law. It would be a shame to the law if such things were permitted, and, even if the actors were allowed to reap a benefit from them, the same as if they had done no wrong. And so it would be if the law could not arrest them in their progress, but must suffer the wrongdoer to complete his scheme and turn the complaining party over to the tardy and expensive satisfaction of an action at law. It seems to us that the court is competent, of course and of necessity, to control its own process, and protect that and the law from such misuse."[389] If a criminal prosecution is resorted to with the view of coercing the payment of a debt, and the defendants are induced to expose property to the officer under the belief that it is necessary for them to do so, and a levy is thereby effected, it will be treated as void.[390] A like result follows when prop-

[389] Pomroy v. Parmlee, 9 Iowa, 140, 74 Am. Dec. 328; see also Parmlee v. Leonard, 9 Iowa, 131; Patterson v. Pratt, 19 Iowa, 361.

[390] Pomroy v. Parmlee, 9 Iowa, 140, 74 Am. Dec. 328; Wells v. Gurney, 8 Barn. & C. 769; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459.

Digitized by Google

erty is taken from the defendant's person against his will, and there levied upon.[391] If property situate in one state or jurisdiction is surreptitiously taken therefrom into another, to be there levied upon, or if the owner is himself, by some false representation or other fraudulent device, induced to bring such property from one state or jurisdiction into another, where it is attached under a writ against him, the levy is void, nor can any valid levy be made until the property has been returned to the state or jurisdiction whence it was decoyed, or ample opportunity given for such return.[392] "A valid and lawful act cannot be accomplished by any unlawful means, and whenever such unlawful means are resorted to, the law will interpose to restore the party injured thereby to his rights."[393] If the arrest of the defendant under a criminal prosecution is made in good faith, and money or other property on his person is taken into the possession of an officer pursuant to the rules and discipline of the prison, under which persons under arrest are searched and their valuables taken from them and placed in custody of such officer, there is no unlawful act to vitiate a levy made upon such goods while in such officer's hands.[394] Other decisions insist, and we think with the better reasoning,

[391] Mack v. Parks, 8 Gray, 517, 69 Am. Dec. 267.

[392] Powell v. McKee, 4 La. Ann. 108; Timmons v. Garrison, 4 Humph. 147; Deyo v. Jennison, 10 Allen, 410.

[393] Deyo v. Jennison, 10 Allen, 410.

[394] Ex parte Hurn, 92 Ala. 102, 25 Am. St. Rep. 23; Closson v. Morrison, 47 N. H. 483, 93 Am. Dec. 459; Reifsnyder v. Lee, 44 Iowa, 101, 24 Am. Rep. 733. The question whether the property might not be exempt from levy because in the custody of the law was not considered in this case. Where an attachment was levied on Sunday, whereby possession of the property was obtained by the officer, it was held that the levy of another writ on the following morning, without first returning the property to its owner, was not void. Blair v. Shew, 24 Kan. 280; Gile v. Devens, 11 Cush. 59.

Digitized by Google

that it is against sound public policy to permit a levy upon property taken from an accused under such circumstances, because, although the real object of the prosecution may have been to procure an opportunity to take possession of, and levy upon, his property, this fact will always be difficult of proof, and the possibility of being able by this means of obtaining possession of property tends to encourage an unlawful use of criminal prosecutions for the purpose of procuring remedies in civil actions to which a party is not entitled.[395]

All the authorities which we have cited agree, however, that if it be shown that the criminal prosecution was instituted as a mere pretext and for the purpose of creating an opportunity to first take away property from the accused upon his arrest, and then to levy thereon in a civil action, this unlawful device must not succeed, and the levy must be set aside. According to the best considered cases, it is not material, at least prior to the actual conviction of the accused, whether the property was taken from him rightfully or wrongfully. Thus the supreme court of Missouri, after a careful consideration of this question, concluded as follows: "It is, therefore, our opinion that if the money and property were taken from the person of the prisoners by authority of law, which the sheriff would be estopped to deny, it was in the custody of the law and subject to the orders of the court in which the criminal proceedings were pending, and was not, at least until after conviction, subject to attachment at a suit of a creditor of the prisoner. If, on the other hand, it was

[395] Hubbard v. Garner, 115 Mich. 406, 69 Am. St. Rep. 580; Holker v. Hennessey, 141 Mo. 527, 64 Am. St. Rep. 524; Hill v. Hatch, 99 Tenn. 39, 63 Am. St. Rep. 822; Richardson v. Anderson, 4 Tex. Civ. App. Cas. 493.

Digitized by Google

taken without authority of law, then it is not subject to attachment because a wrongful use was made of criminal process in getting possession. Such an abuse of criminal process is against the policy of the law, and would be violative of one of the rights guaranteed by the constitution." [396]

§ 270. The Care Which must be Taken of the Property Levied upon.—That an officer after levying must take care of the property, either in person or by his agents, and have it forthcoming to satisfy the writ, is undoubted. It is also well settled that he is answerable to either party for any injuries suffered from the negligence of the officer in the care of the property while held by him under the writ.[397]

But the degree of care which he must exercise is by no means settled. He has no right to permit a rescue of the property, for he has the authority to summon the power of the county to his aid. Hence, in an action against him, it is no defense for him to show that the property, after the levy, was taken from him by force.[398] In Pennsylvania the very highest degree of care in the preservation of property is exacted. An officer, after levying, must produce the property when needed for the satisfaction of the writ, unless prevented from so doing by the act of God, sudden accident, or the public enemy.[399] This doctrine seems to meet with

[396] Holker v. Hennessey, 111 Mo. 527, 64 Am. St. Rep. 524.

[397] Witkowski v. Hern, 82 Cal. 604; Wood v. Bodine, 32 Hun, 354; Eastman v. Judkins, 59 N. H. 576; Shearman and Redfield on Negligence, § 621.

[398] Sly v. Finch, Cro. Jac. 514; Mildmay v. Smith, 2 Saund. 344; Cleark v. Withers. 2 Ld. Rym. 1075; 1 Salk. 322, 6 Mod. 290; Snell v. State, 2 Swan. 344.

[399] Hartleib v. McLane, 44 Pa. St. 510, 84 Am. Dec. 464; Mitchell v. Commonwealth, 37 Pa. St. 187.

Digitized by Google

substantial approval in Mississippi [400] and in Georgia. Thus, in the last-named state an officer was, in one case, held liable for money deposited by him in a bank which afterward became insolvent; [401] and in another case was forced to replace money which had been stolen from him.[402] The more recent decisions in Mississippi indicate that an officer is not, in that state, under obligation to exercise any more than reasonable care, and hence is not answerable for a loss by fire of goods in a store in which they were attached, though they would not have been lost if they had been moved elsewhere, there being, however, no reason to believe that the storehouse was an unsafe place.[403]

If public officers may show that goods in their hands have been purloined, and may thus excuse themselves for not having such goods to sell under the writ, a very great temptation to fraudulent conduct is offered to them. We are, therefore, very much disposed to think that the stringent rules of the Pennsylvania judicial tribunals are warranted by sound public policy, are conducive to official diligence and official morality, and are not more unjust in their operation than rules of a more lax nature must necessarily prove. Whenever property in the hands of a sheriff or constable is purloined, or otherwise escapes from custody, the resulting loss must be borne by some one. It is, at least, as just that this loss should fall upon the officer, whose duty it was to protect the property, as that it should fall upon the plaintiff or defendant, neither of whom has the author-

[400] Collins v. Terrall, 2 Smedes & M. 383; Garrett v. Hamblin, 11 Smedes & M. 219.

[401] Phillips v. Lamar, 27 Ga. 228, 73 Am. Dec. 731.

[402] Gilmore v. Moore, 30 Ga. 628.

[403] State v. Dalton, 69 Miss. 611.

Digitized by Google

ity to afford such protection. Property seized under execution is ordinarily to remain in custody of the law but a short time. Property taken in attachment, on the other hand, must frequently be kept for a long period of time to await the result of protracted litigation. There is, therefore, much reason for sanctioning, in attachment cases, a less degree of diligence than ought to be exacted where property is held under execution.[404] But the tendency of a majority of the modern decisions is to place levies under attachment upon the same footing with levies under execution, and to exact of officers, in either case, only that degree of care in keeping property which an owner of ordinary prudence and sagacity would exercise in preserving like property.[405] "The sheriff is not liable, absolutely at all events, for the loss of property attached and for not having it to apply to the execution, but only for a loss for want of ordinary care and prudence. He does not insure the property nor guarantee its safekeeping, but is under the duty to exercise ordinary care and diligence in looking after it; and if he does this, he is not responsible for a loss." [406]

A marshal attached and took into his possession a steam tug, which, while in such possession, filled with water and sank, and was allowed to remain submerged some two months. In an action brought against him in which it was claimed that the injuries thus suffered

[404] Bridges v. Perry, 14 Vt. 262; Jenner v. Joliffe, 6 Johns. 9.

[405] Briggs v. Taylor, 28 Vt. 180; Dorman v. Kane, 5 Allen, 38; Parrott v. Dearborn, 104 Mass. 104; Starr v. Moore, 3 McLean, 354, 542; Snell v. State, 2 Swan, 344; Moore v. Westervelt, 27 N. Y. 234; Browning v. Hanford, 5 Hill, 588, 40 Am. Dec. 369; State v. Nelson, 1 Ind. 522; Stewart v. Nunemaker, 2 Ind. 47; Cresswell v. Burt, 61 Iowa, 590; Lambeth v. Joffrion, 41 La. Ann. 749.

[406] Eastman v. Judkins, 59 N. H. 576.

Digitized by Google

by the vessel had resulted from his negligence, he insisted that he did not move it from the dock where the owner had placed it, and that he had removed furniture and other articles, and that this was all the care he was under any obligation to observe. It was held that the seizure of the vessel by the officer necessarily deprived the owner of possession, and that it was neither within his duty nor power to look after the vessel, and that the officer was answerable, because it did not appear that he did anything whatever for the safety of the vessel.[407]

[407] Jones v. McGuirk, 51 Ill. 382. The court in this cause seems to have thought that a higher degree of care was due from a marshal under the circumstances than would have been due from an officer levying an ordinary attachment or execution. Upon the questions before it the court said: "What, then, was the legal duty of appellant, he having this boat in his custody? The office of marshal is one of great trust, and he is clothed with vast powers for good or for evil, and public policy, if no other consideration, requires he should be responsible for all the injury he may do in his office. If the injury proceeds from an act of a deputy, or other person assisting him in the performance of his duty, the marshal alone is immediately responsible to the injured party. It was the duty of the marshal, then, to use due diligence to keep this vessel safely. Eames v. Hennessey, 22 Ill. 628. Due diligence is understood to be such as a careful, prudent man, of reasonable sense and judgment, well acquainted with the condition of the property, might reasonably be expected to take if the vessel belonged to himself. He should know whether she leaked; whether the place she occupied was a proper one; whether, in the removal of the pipes, any holes had been left open through which water might enter the vessel; what bad effect ice might have upon her which might be avoided; what would be her condition in case of a sudden rise of water and breaking up of the ice. That no care whatever was bestowed upon this boat is shown by all the testimony. She went down gradually—was three days sinking, upon any one of which, one man, with a common tin pump, could have relieved her in a few hours, as she could have been bailed out in a short time. A passerby, seeing her condition, said to a man there, 'She has sprung a leak,' and the reply was he thought she had. Whether this was the custodian or not, does not appear, but some one should have been there, representing the marshal, to know her condition and

Digitized by Google

If an officer delivers goods to a keeper or receiptor of his own choosing, he is answerable for the negligence of such keeper or receiptor in the care of the property, but if he was induced to appoint such keeper or receiptor and to deliver possession to him by either of the parties to the action, such party seems to assume the risk of the negligence of the person so selected by him, and cannot recover of the officer damages suffered thereby.[408]

Where property escapes, or is purloined from an officer without his fault, it has been intimated that the loss must be borne by the defendant.[409] If an officer mistreats property in his custody, as where he cruelly overworks a horse, it is said that he may be treated as a trespasser ab initio.[410]

§ 271. Release and Vacation of Levies by the Plaintiff.—A levy may be abandoned or vacated by the direct act of the plaintiff or of the officer executing the writ; or indirectly, by their not continuing the acts necessary to keep it in force. It may likewise be vacated by order of the court having control of the process. The vacation of the levy may also take place without any direct act or order either of the parties or of the court, as where it follows as a legal consequence from some proceeding taken in the suit, which, though not

guard against accidents, and with an eye to her protection and safety. The case is not at all like ordinary cases of a levy upon personal property by a sheriff or constable, or process in a personal action. Hence the law required the marshal to take the property into his custody. Failing to do so, or to appoint a fit custodian, he must be responsible for the consequences."

[408] Eastman v. Judkins, 59 N. H. 76; Hamilton v. Dalziel, 2 Wm. B. 952; De Moranda v. Dunkin, 4 T. R. 119.

[409] Starr v. Moore, 3 McLean, 354, 542.

[410] Briggs v. Gleason, 29 Vt. 78.

Digitized by Google

in express terms directed against the levy, operates to its extinguishment. The plaintiff or the sheriff may abandon the levy when it ought not to have been made, as where the property of a stranger has been taken,[411] or where the seizure is of goods not subject to execution. Where, however, the levy is valid, and possession has been taken under it, the plaintiff has no right to abandon it against the will of the defendant. He is bound to proceed to sell the goods, and credit the proceeds on the writ. If he declines to do this, the defendant can refuse to accept the return of the property, and insist that it shall, to the extent of its value, operate as a satisfaction of the judgment.[412]

The plaintiff abandons his levy, at least as against third persons, where he directs a stay of proceedings, or in some of the states, where he permits the property to remain in or to return to the possession of the defendant after the levy, or where he directs the sheriff to return the writ unsatisfied.[413] The levy may be abandoned by lapse of time, or by such delay as indicates an intention not to pursue the levy, or to use it as a mere security, or to protect the property against other creditors. The question whether a levy has been abandoned generally arises in controversies between the plaintiff in execution and other creditors of the defendant, and there can be no doubt that, as to such creditors, a levy may be deemed abandoned when, as against the defendant, it may be regarded as still in force. Even the defendant may, however, raise this question, and if the levy has been actually and inten-

411 State v. Swigart, 22 Ark. 528.
412 Smith v. Hughes, 24 Ill. 270.
413 Rickards v. Cunningham, 10 Neb. 417.

Digitized by Google

tionally abandoned, it can have no greater force against him and his property than if never made.[414]

A levy is often spoken of as abandoned, when what is meant is that the facts intervening after it was made show that it was not made in good faith nor for the purpose of enforcing it, and must, therefore, be disregarded. If the object of the plaintiff apparently was merely to obtain some security, or to prevent some other levy being made in advance of his, or to hinder or delay other creditors of the defendant, the levy must be adjudged fraudulent and void. When, after the making of the levy, there is no attempt to sell the property within a reasonable time, and it is permitted to remain in the possession of the defendant, or, from any course of conduct, the inference must be reached that the plaintiff did not or does not intend to enforce his levy by coercing, through its aid, the payment of his demand, the conclusion cannot be resisted, either that the levy was without good faith in its inception, or that the plaintiff has concluded, for some reason satisfactory to himself, to abandon it. The result in either case is the same, at least as between the plaintiff and other creditors of the defendant, namely, that the levy is no longer in force.[415]

On the other hand, a mere continuance of the time of sale or other reasonable indulgence granted to the defendant does not establish an abandonment of the levy, if, from the whole circumstances, it is apparent that no abuse of the writ was intended.[416]

[414] Smith v. Dickson, 9 Ga. 400.

[415] Burleigh v. Piper, 51 Ia. 649; Hanson v. Taper I. Incorp., 72 Ia. 622; Cook v. Clemens, 87 Ky. 566; Russell v. Major, 29 Mo. App. 167; Hall v. Vanderpool, 156 Pa. St. 152; Jones L. & M. Co. v. Faris, 6 S. D. 112, 55 Am. St. Rep. 814.

[416] Terry v. Americus Bank, 77 Ga. 528; Connell v. O'Neil, 154 Pa. St. 582.

Digitized by Google

One officer may, under some circumstances, abandon possession to another of goods levied upon without intending to abandon and without, in fact, destroying the effect of the levy, as where a constable, after making a levy, allows a sheriff having another writ to take possession of, and to levy upon, the property, but at the same time claims that his levy has precedence over the writ in the sheriff's hands, and, upon a sale of the property, seeks priority in the distribution of the proceeds.[417]

A sheriff who has levied an execution may, on the appointment of a receiver for the defendant in another action, allow that officer to take possession, and dispose of, the property levied upon, leaving the right to the proceeds of the sale to be determined by the court, for, under such circumstances, it is clear that no abandonment of the levy is intended.[418]

The only proper object of a levy is to compel satisfaction of the writ out of the property seized; and if the plaintiff, by his long delay in following his levy by a sale, or by directions to return the writ unsatisfied, or by any other course of action, indicates that his employment of the writ is not to coerce the prompt payment of his debt, then the levy is abandoned.[419]

When property levied upon is not sold before the return day, the proper writ to enforce a sale thereof is a venditioni exponas; while the proper writ to authorize a new levy is an alias fieri facias. Hence, the suing out of the latter instead of the former writ has

[417] Miller v. Getz, 135 Pa. St. 558, 20 Am. St. Rep. 887.

[418] Mathew's Estate, 144 Pa. St. 139; Vance v. Royal C. M. Co., 82 Fed. Rep. 251.

[419] Allen v. Levy, 59 Miss. 613; Speelman v. Chaffee, 5 Colo. 247. See ante, § 206.

Digitized by Google

sometimes been held to be conclusive,[420] and sometimes to be prima facie,[421] evidence that the plaintiff had abandoned his levy. In Ohio the issue of an alias fieri facias, instead of a venditioni exponas, is not a waiver of a previous levy.[422] Upon principle, the effect of taking out an alias writ must be regarded as a matter of evidence rather than of law. It tends to prove the abandonment of a prior levy; but of itself it is neither abandonment, nor indisputable evidence of abandonment. "To constitute an abandonment of a right secured, there must be a clear, unequivocal, and decisive act of the party—an act done which shows a determination in the individual not to have a benefit which is designed for him." [423] The issue of an alias or second execution, while a levy on a prior writ remains undisposed of, is an irregularity which might very properly be corrected by the vacation of the second writ. It indicates misguided zeal in attempting to obtain satisfaction rather more than a desire to permit the first writ to become dormant, or to abandon any advantage gained by it. Unless other circumstances tend to establish the abandonment of a levy, we do not understand how it can be inferred merely from the mistaken and irregular issue of an alias writ.[424] Nor is an abandonment of a regular and adequate levy inferable from a subsequent irregular levy. In Mississippi, upon a claim by a third person to property seized under execution, it becomes the duty of the officer, after receiving

[420] Scott v. Hill, 2 Murph. 143.

[421] Alley v. Carroll, 3 Sneed, 110.

[422] Bouton v. Lord, 10 Ohio St. 453.

[423] Dawson v. Daniel, 2 Flipp. 309.

[424] West v. St. John, 63 Iowa, 287; Menge v. Wiley, 100 Pa. St. 617; Wilson v. Sheriff, 161 Ill. 49; Friyer v. McNaughton, 110 Mich. 22.

Digitized by Google

an affidavit and bond as designated in the statute, to return them with the execution, and to take no further proceedings under the writ until the claim is decided. An officer disregarded the statute, and, instead of returning his execution, proceeded to make other levies thereon and for an amount greater than the statute authorized, and this was claimed to operate as an abandonment of the first levy. It was held that whatever might be the effect of the irregularity of the additional levies, they could not vitiate the first and regular levy, and that such levy could not properly be treated as abandoned.[425]

§ 271 a. Release of Levy Otherwise than by Act or Default of Plaintiff.—When a levy is irregularly or improperly made, its validity cannot be supported by the writ under which the officer assumed to act. The validity of such levy may be questioned in two ways, 1, by proceeding in the court under whose writ it was made by motion to quash, and 2, by resisting the effect of the levy in any collateral proceeding in which it may be drawn in question. In proceedings of the latter class it is evident that the consideration of the question may be affected, and perhaps rendered immaterial, by the introduction of other issues either of law or of fact, such as, that the parties whose rights were sought to be affected by the levy have by their acquiescence or inaction, or otherwise, waived the alleged irregularity, or that it is not of so serious a nature as to impair the force of subsequent proceedings based upon it. The proper mode of attacking a levy is by a motion to quash it in the court under whose writ it is made,

[425] Davis v. Netterville, 68 Miss. 429.

Digitized by Google

and where this course has not been pursued, relief cannot be had in a court of equity.[426]

In some of the states special proceedings have been provided by statutes for the questioning of a levy. Thus, in Vermont, if a levy on real property is not absolutely void, it may be assailed for irregularity in a petition filed in the proper court.[427]

In Georgia a party may question a levy by proceeding by affidavit of illegality, but this is a cumulative remedy merely, and does not prevent the proceeding by motion to quash.[428]

Notice should be given of the motion to quash the levy, because all persons interested under it are entitled to be heard in opposition to the motion.[429]

As the sheriff has no direct interest in the maintenance of the levy, notice of the motion need not be given him, especially if the levy is upon real property only.[430]

The court will not, upon the motion of one not a party to the action, undertake to determine the title to the property levied upon. Therefore, this is not a proper remedy for one whose property has been levied upon under execution against another, and whose claim is not that there was irregularity in the levy, but only that the officer has seized the property of a stranger to the writ.[431]

[426] Palmer v. Gardiner, 77 Ill. 143; Campau v. Godfrey, 18 Mich. 27, 100 Am. Dec. 133.

[427] Briggs v. Green, 33 Vt. 565; Parker v. Parker, 54 Vt. 341; Whitefield v. Adams, 65 Vt. 632.

[428] Hill v. De Launay, 34 Ga. 427.

[429] Ralston v. Field, 32 Ga. 453; Bonesteel v. Orvis, 23 Wis. 606, 99 Am. Dec. 201.

[430] Demint v. Thompson, 80 Ky. 255.

[431] Cawthorn v. Knight, 11 Ala. 268; Hewson v. Deygert, 8 Johns. 333; Insurance Co. v. Ketland, 1 Binn. 499; Harrison v. Waln, 9 Serg. & R. 318.

Digitized by Google

It seems, however, that the plaintiff may move to vacate a levy made under his writ, on the ground that the property seized did not belong to the defendant in execution, and was not subject thereto, and by this means may rebut or disprove the apparent satisfaction produced by the return showing the levy of his writ on property sufficient to satisfy it.[432]

The motion may proceed either on the ground of defects in the writ or of defects in its levy. Doubtless where the defect is of the first named class, the motion of the party will ordinarily be to quash the writ itself, but in some instances the motion has been directed against the levy, and has been sustained.[433]

"On a motion to quash, annul, or set aside a levy made on the return on an execution, we may look to the execution to see if it carries on its face sufficient warrant for such levy and return. We may look to the judgment, not for the purpose of reversing or reforming it, but to ascertain if it affords authority for the issuance of the execution on which the levy and return were made. We may look likewise at the different executions that have been issued for the purpose of determining if, by the law, such levy and return can be sustained." [434]

Where the ground of the motion is not that the writ was irregular or void, or did not authorize the levy in question, it may be that the levy was not properly made, either because the officer who made it was not competent to act,[435] or that, though competent, he did not do the acts essential to a valid levy, or, in

[432] Osborne v. Wilson, 37 Minn. 8; Tuder v. Taylor, 26 Vt. 444.
[433] Bonesteel v. Orvis, 23 Wis. 506, 99 Am. Dec. 201.
[434] Scott v. Allen, 1 Tex. 513.
[435] State v. Jeter, 60 Ga. 489.

Digitized by Google

doing them, disregarded some right of the defendant, or that the property seized upon was of a class not subject to the writ. The levy may be vacated in part, at least, because it is excessive,[436] or the property not subject to execution,[437] or the writ was special, and did not authorize a levy upon the property in question,[438] or because the property seized was in custodia legis,[439] or the debtor had been discharged in bankruptcy,[440] or because he had not been allowed to designate the property on which the levy should be made,[441] or because personalty was seized instead of realty.[442] A motion to vacate a levy is not an appropriate proceeding to try questions of title to property, nor to determine whether property is subject to execution. The courts will, however, interfere by motion to prevent abuses of their process, or to see that the fruits of an abuse already perpetrated are not retained. Hence, they will, on motion, set aside a levy effected by a resort to improper and fraudulent means.[443] In Tennessee it seems that the courts will interpose to order the release of property on the ground that it is exempt.[444] As a general rule, however, where property is claimed to be exempt, the rights of the claimant must be tried in some independent suit, and not by a motion to vacate the levy.

[436] Palmer v. Gardiner, 11 Ill. 143; Bogle v. Bloom, 36 Kan. 512; Campau v. Godfrey, 18 Mich. 27, 100 Am. Dec. 133.

[437] Commercial Bank v. Waters, 10 S. & M. 559; Catron v. Lafayette County, 125 Mo. 67.

[438] Reeves v. Chattahoochee B. Co., 85 Ga. 477.

[439] Robinson v. A. & G. W. R. W. Co., 66 Pa. St. 160; McLemore v. Benbow, 19 Ala. 76.

[440] Linn v. Hamilton, 34 N. J. L. 305.

[441] Bryan v. Bridges, 6 Tex. 137.

[442] Pitts v. Magie, 24 Ill. 610.

[443] Pomroy v. Parmlee, 9 Iowa, 140, 74 Am. Dec. 328; ante, § 269 a.

[444] Jones v. Williams, 2 Swan, 105.

Digitized by Google

Anything that puts an end to a judgment necessarily terminates the levy made for its enforcement. Hence, a levy is discharged by the satisfaction or reversal[445] of the judgment, or by an order that the judgment shall not be enforced,[446] or by an order that it shall not be enforced against the property because the same has been found to be exempt.[447] Tender of the amount due upon the writ, though not accepted, discharges the levy. "It is a general rule of law that where a person holds a lien upon property, a tender by the owner of the property of the amount of the lien will discharge it." "The principle governing the subject is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits and securities. The instantaneous effect is to discharge any collateral lien, as a pledge of goods, or a right of distress." "After the action is over, and judgment obtained, and execution levied, the case becomes clearly assimilated to that of an ordinary lien, and if tender is made and not accepted, the lien will be extinguished." [448]

In several of the states an injunction, though adjudged to have been wrongfully issued, operates as an irrevocable release of a levy previously made.[449] We

[445] Mosely v. Gainer, 10 Tex. 393.

[446] Mulford v. Estudillo, 32 Cal. 131.

[447] Hall v. Hough, 24 Ind. 273.

[448] Tiffany v. St. John, 65 N. Y. 319.

[449] Lockridge v. Biggerstaff, 2 Duvall, 281, 87 Am. Dec. 498; Keith v. Wilson, 3 Met. (Ky.) 202; Trueman v. Berry, 6 B. Mon. 536; Eldridge v. Chambers, 8 B. Mon. 411; Burks v. Bass, 4 Bibb, 338; Bisbee v. Hall, 3 Ohio, 449; Hamilton v. Henry, 5 Ired. 218; Murphy v. Partee, 7 Baxt. 373; Telford v. Cox, 15 Lea, 298.

Digitized by Google

think the more logical view of this question is, that as an injunction operates solely upon the person of the party enjoined, its effect does not extend to the judgment or lien which that person has; that such judgment or lien continues in legal existence, notwithstanding the temporary restraint on its owner; and that, when the restraint is removed by the dissolution of the injunction, the judgment, and all liens derived thereunder, may be enforced as though the restraint had never been imposed.[450] Under this view, an injunction, while it may suspend the proceedings, does not vacate the levy. A levy is not vacated by an order temporarily staying proceedings,[451] even though, at the same time, an order is made opening the judgment, and permitting the defendant to make a defense.[452]

In Delaware and Mississippi it is said that a supersedeas bond "is an amotion" of a prior levy; that the security afforded by the bond supplants and extinguishes the security acquired by the levy.[453] But while a sufficient bond, given for the stay of proceedings pending the prosecution of an appeal or a writ of error, is conceded to compel the suspension of all further acts to enforce the judgment,[454] it is usually regarded as leaving unimpaired the lien derived from the judgment, or from any levy made thereunder. Hence, such a bond does not, in most of the states, vacate a previous levy,

[450] Miller v. Estill, 8 Yerg. 452; Anderson v. Tydings, 8 Md. 427, 63 Am. Dec. 708; Pettingill v. Moss, 8 Minn. 222, 74 Am. Dec. 747; Boyd v. Harris, 1 Md. Ch. 466.

[451] Batdorff v. Focht, 44 Pa. St. 195; Band v. Willett, 31 N. Y. 102; Daviess v. Myers, 13 B. Mon. 513.

[452] Reid v. Lindsey, 104 Pa. St. 156; Slutter v. Kirkendall, 100 Pa. St. 307.

[453] Parker v. Dean, 45 Miss. 408; Pettijohn v. Bloxom, 1 Houst. 594.

[454] Bassett v. Daniels, 10 Ohio St. 617.

Digitized by Google

though it is said that the court may vacate it, and restore the property to the defendant when satisfied of the good faith of the appeal, and the adequacy of the security afforded by the bond.[455]

§ 271 b. **Result of Release of Levy.**—Whenever, from any cause, or by any means, a levy is vacated or released, the lien which depended on it is extinguished, and the plaintiff has no more right or interest in the property than if no levy had ever been made.[456] The only mode of avoiding the effect of an order of court quashing a levy is by some proceeding to vacate or review such order. It will sometimes be vacated in the court entering it, when shown to have been improvidently made.[457]

In some respects the plaintiff is in a less desirable situation than if the writ had never been levied. As has been already shown, the levy is a conditional satisfaction of the writ and judgment to the value of the property seized; and, if the release is due to the fault of the plaintiff, or the officer, and is not assented to or ratified by the defendant, the plaintiff may be precluded from issuing any further writ, or taking any further proceedings looking to the collection of his judgment, until the amount of the credit to which defendant is entitled for the abandoned levy has been judicially ascertained. The plaintiff may have caused an attachment to be issued and levied before the entry of

[455] Stricker v. Wakeman, 13 Abb. Pr. 85; Smith v. Allen, 2 E. D. Smith, 259; Cook v. Dickerson, 1 Duer, 679; Bowman v. Cornell, 39 Barb. 69; Heebner v. Townsend, 8 Abb. Pr. 234; Arnold v. Fuller, 1 Ohio, 458; Onderdonk v. Emmons, 9 Abb. Pr. 187; 17 How. Pr. 545; 2 Hilt. 505; Moore v. Rittenhouse, 15 Ohio St. 310; Northwestern Ex. Co. v. Landes, 6 Minn. 564.

[456] Patton v. Sheriff, 2 Ohio, 396; Waymire v. Staley, 3 Ohio, 366.

[457] Wilson v. Herrington, 86 Ga. 777.

Digitized by Google

his judgment to secure the payment thereof. If the judgment is a lien upon real estate, the lien of the attachment merges into that of the judgment, and will be destroyed by whatsoever destroys the judgment lien.[458] If chattels are attached upon which the judgment is not a lien, what is the duration of the attachment lien? There is reason for holding that, having been effective to seize and retain the property until it is brought within the lien of the execution and of its levy, the attachment has fulfilled its mission; and if proceedings under execution are abandoned and the property released, there is no authority to retake and sell it, arising from the original attachment.[459]

§ 272. Liability of Officers for Wrongful Levies.—A levy may be wrongful from two causes: 1. Because the writ does not justify any levy whatever; and 2. Because the writ, though justifying some levy, does not warrant the officer in the one which he makes. The writ does not justify any levy whatever if it was void when issued; or if, though valid when issued, its force is destroyed prior to the levy by the satisfaction or reversal of the judgment, or by any other means.[460] The liability of an officer for levying under a writ void or irregular when issued, or under a writ valid when issued, and subsequently losing its force by satisfaction or otherwise, is limited to those cases in which he has notice, either upon the face of the writ, or by some other means, of the infirmity which renders the writ

[458] Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

[459] Speelman v. Chaffee, 5 Colo. 247; Snell v. Allen, 1 Swan, 208.

[460] Allbright v. Mills, 86 Ala. 324; Tower v. McDowell (Cal.), 31 Pac. 843; Trowbridge v. Bullard, 81 Mich. 451; Kamerick v. Castleman, 29 Mo. App. 658.

Digitized by Google

invalid.[461] But where the writ is valid, but the action taken under it is unauthorized, the rule is otherwise. The officer must at all times determine at his peril whether he is acting within the limits of the authority conferred by his writ.[462] For going beyond these limits he is always responsible, irrespective of the innocence of his intent. In acting under the writ, the officer may err, in seizing the property of the wrong person, or in seizing the wrong property of the right person. For either mistake, though resulting from an honest exercise of his judgment, he is always responsible. If he takes the property of a stranger, he may be sued as a trespasser, or in such other form of action as the party whose rights are invaded may elect to pursue.[463] Nor will this rule be relaxed on account of a

[461] O'Briant v. Wilkerson, 122 N. C. 304; Goodjoin v. Gilreath, 32 S. C. 388; Rice v. Miller, 70 Tex. 613, 8 Am. St. Rep. 630.

[462] Buck v. Colbath, 3 Wall. 335; Life & F. Ins. Co. v. Adams, 9 Pet. 573; Segourney v. Ingraham, 2 Wash. C. C. 336; The Monte Allegre, 9 Wheat. 645; Mussey v. Cummings, 34 Me. 74; Green v. Morse, 5 Me. 291; Six Carpenters' Case, 8 Coke, 146; Bradley v. Davis, 14 Me. 44, 30 Am. Dec. 729; Jarratt v. Gwathmey, 5 Blackf. 237; Wortman v. Conyngham, Pet. C. C. 241.

[463] Townsend v. Phillips, 10 Johns. 98; Rhodes v. Patterson, 3 Cal. 469; McMahan v. Green, 34 Vt. 69, 80 Am. Dec. 665; Van Pelt v. Littler, 14 Cal. 194; Yarborough v. Harper, 25 Miss. 112; Nagle v. Mullison, 34 Pa. St. 48; Markley v. Rand, 12 Cal. 275; McDougald v. Dougherty, 12 Ga. 613; James v. Thompson, 12 La. Ann. 174; Boulware v. Craddock, 30 Cal. 190; Weber v. Henry, 16 Mich. 399; Green v. Morse, 5 Me. 291; Ackworth v. Kempe, 1 Doug. 40; Weston v. Dorr, 25 Me. 176, 43 Am. Dec. 259; Foss v. Stewart, 14 Me. 312; Codman v. Freeman, 3 Cush. 306; Munday v. Stubbs, 1 E. L. & E. 392; 20 L. J. C. P., N. S., 59; 14 Jur. 1027; Glasspoole v. Young, 9 Barn. & C. 696; Heath v. Daggett, 21 Mo. 69; Pike v. Colvin, 67 Ill. 227; Turner v. Killian, 12 Neb. 580; Albright v. Mills, 86 Ala. 324; Black v. Clasby, 97 Cal. 482; Holton v. Taylor, 80 Ga. 508; Waldrup v. Almand, 94 Ga. 623; Stockwell v. Robinson, 9 Houst. 313; Hanchett v. Williams, 21 Ill. App. 56; Palmer v. Shenkel, 50 Mo. App. 571; McAllaster v. Bailey, 127 N. Y. 583; Dixon v. White S. M. Co., 128 Pa. St. 397, 15 Am. St. Rep. 683; Berwald v. Ray, 165 Pa. St. 192.

Digitized by Google

mistake in the identity of the defendant, nor because the defendant and the person whose goods are seized have precisely the same names.[464] In some of the states a sheriff is not liable as a trespasser for seizing the property of a third person in possession of the defendant in execution, when the officer had no notice of the true ownership of the property, but, if, after receiving such notice, he insists upon retaining the property, he is thereafter liable to the same extent as if he had levied upon such property when not in possession of the defendant in execution.[465] If, before making a levy, the officer is informed that a portion of the general mass of property, upon which he is about to levy, belongs to third persons, it becomes his duty "to make reasonable effort to ascertain and separate the same from the property on which the levy is to be made. Unless such reasonable efforts are made to ascertain what portion of the general mass in fact belongs to third persons, and, unless reasonable efforts are also made to separate the same, an officer cannot escape liability for a seizure of property which does not in fact belong to the defendant named in the writ. This is clearly the rule, except in those cases where the goods or chattels of one person have been intentionally mixed with the goods or property of another for some fraudulent or unlawful purpose."[466] Though the defendant in execution is the owner of the legal title to the property levied upon, it may be subject to a pledge or mortgage, in which event an officer chargeable with notice

[464] Jarmain v. Hooper, 7 Scott N. R. 663; Walley v. McConnell, 13 Q. B. 903.

[465] Armstrong v. Bell (Ky.), 42 S. W. 1131.

[466] Orr etc. S. Co. v. Needles, 67 Fed. Rep. 990; Treat v. Barber, 7 Conn. 274; Weil v. Silverstone, 6 Bush, 698; Smith v. Sanborn, 6 Gray, 134; Wilson v. Lane, 33 N. H. 466.

Digitized by Google

of the mortgage or pledge is answerable to the mortgagee or pledgee for any levy or sale inconsistent with his rights.[467] When the defendant has property which is exempt from execution, the courts do not agree whether he must first claim his privilege of exemption before the officer can take any notice of it.[468] But, where the exempt character of the property, and the fact that the defendant desires to avail himself of his privilege, are both known to the officer, and he proceeds in defiance of the defendant's claim, there is no doubt that he is responsible to the same extent as if he had taken the property of a stranger to the writ.[469]

The law usually requires the officer to levy upon personal property, if sufficient can be found to satisfy the writ, before making any levy upon real estate. But, under some statutes, the rule is the other way, and real estate must be exhausted before seizing personal property. Under whichever of these rules the officer may be called upon to act, he is responsible for any unjustifiable departure. If he levies first upon the property which should have been seized last, he is liable for all damages occasioned the defendant thereby.[470] When

[467] McDaniel v. State, 118 Ind. 239; Appleton M. Co. v. Warder, 42 Minn. 117.

[468] See § 211.

[469] Atkinson v. Gatcher, 23 Ark. 101; Van Dresor v. King, 34 Pa. St. 201, 75 Am. Dec. 643; Perry v. Lewis, 49 Miss. 443; Spencer v. Brighton, 49 Me. 326; Mark's Appeal, 34 Pa. St. 36, 75 Am. Dec. 631; Davis v. Bryan, 7 Yerg. 88; Hutchinson v. Campbell, 25 Pa. St. 273; Frost v. Mott, 34 N. Y. 253; Spencer v. Long, 39 Cal. 700; Wyckoff v. Wyllis, 8 Mich. 48; Cook v. Baine, 37 Ala. 350; Stephens v. Lawson, 7 Blackf. 275; Hazard v. Israel, 1 Binn. 240, 2 Am. Dec. 438; Ladd v. Thomas, 12 Ad. & E. 117; West v. Nibbs, 4 Com. B. 172; Ellis v. Taylor, 8 Mees. & W. 415; Servanti v. Lusk, 43 Cal. 239; Fuller v. Sparks, 39 Tex. 137; State v. Herrington, 33 Mo. App. 476.

[470] Beeler v. Bullitt, 3 A. K. Marsh. 280, 13 Am. Dec. 161; Hopkins v. Burch, 3 Ga. 222; Gorham v. Hood, 27 Ga. 300; Simpson v.

Digitized by Google

an officer wrongfully exercises a right of dominion over personal property, he is guilty of a conversion. His liability for the conversion attaches at once, and cannot be removed by any act of his, unless by the assent of the owner of the property. Hence, the officer cannot successfully resist an action for such conversion by showing that he subsequently made a valid levy under a valid writ,[471] or that he offered to restore the property to the owner.[472] Such a restoration, even when accepted, does not destroy the original cause of action, but may be pleaded in mitigation of damages.[473]

When an officer is sued for the wrongful levy by him upon property which is not subject to execution, either because exempt or because it did not belong to the defendant in execution, or for any other reason, and the plaintiff establishes the facts necessary to entitle him to judgment, the measure of damages is ordinarily the same as if the officer had not acted, or purported to act, under his writ of execution, and is commonly such sum as may be necessary to recompense the plaintiff for the injury suffered, excluding such speculative elements as are too remote to be taken into consideration.[474] If the plaintiff is a mortgagee or has a special interest only in the property, the general ownership being in

Hiatt, 13 Ired. 470; Hassell v. Southern Bank, 2 Head, 381; Swingle v. Boyler, 1 Over. 226.

[471] Lyon v. Yates, 52 Barb. 237; Otis v. Jones, 21 Wend. 394; Leise v. Mitchell, 53 Mo. App. 563.

[472] Livermore v. Northrop, 44 N. Y. 107.

[473] Hanmer v. Wilsey, 17 Wend. 91; Higgins v. Whitney, 24 Wend. 379; Reynolds v. Shuler, 5 Cow. 323; Castle v. Ford, 53 Neb. 507.

[474] MacVeagh v. Bailey, 29 Ill. App. 606; Hanchett v. Ives, 171 Ill. 122; Frankhouser v. Cannon, 50 Kan. 621; Whittington v. Pence (Ky.), 38 S. W. 843; Dallemand v. Janney, 51 Minn. 514; Casper v. Klippen, 61 Minn. 353, 52 Am. St. Rep. 604; Castle v. Ford, 53 Neb. 507.

Digitized by Google

the defendant in execution, the measure of damages must be limited to the special interest of the plaintiff.[475] Though the cases awarding punitive or exemplary damages against the levying officer are quite infrequent, there is no doubt that he is not exempt from damages of this character where the evidence shows that his action, in addition to being unlawful, was wanton or malicious, or, in other words, was coupled with an intentional wrong.[476] Where mental anguish or suffering was claimed as an element of damages for the unlawful seizure and detention of personal property by an officer, the claim was denied, and the court said: "The plaintiff is entitled to recover all her actual damages sustained from the wrongful acts of the defendants, including not only the value of the property not returned, but also whatever damages may have accrued from its seizure and detention. Furthermore, she may be allowed exemplary damages, in the discretion of the jury, if such circumstances of aggravation are shown as would bring her within the rule; but her case does not come within the doctrine of 'mental anguish.'" [477]

§ 273. Liability of Plaintiffs and Others for Wrongful Levies.—When the plaintiff places his execution in the hands of an officer for service, he is presumed to intend that no action shall be taken thereunder not authorized by the terms of the writ. The sheriff may seize the property of a stranger, or do any other unauthorized act, without thereby creating any liability against the plaintiff, because the plaintiff is not presumed to have

[475] Collins v. State, 3 Ind. App. 542, 50 Am. St. Rep. 298; Rocheleau v. Boyle, 12 Mont. 590.

[476] Stilson v. Gibbs, 53 Mich. 280; Cronfeldt v. Arrol, 50 Minn. 327, 36 Am. St. Rep. 648; State v. Jungling, 116 Mo. 162.

[477] Chappell v. Ellis, 123 N. C. 259, 68 Am. St. Rep. 822.

Digitized by Google

directed or ratified the illegal proceeding.[478] But this presumption may be rebutted. The injured party may show that the plaintiff was a cotrespasser with the officer, and may thus make both responsible for their abuse of the writ. Where the plaintiff is present at the levy,[479] or advises [480] or directs [481] it to be made, he is a cotrespasser with the officer.

"It is conceded that, in a case of joint trespass, the party injured may sue one or all of the trespassers, and each one will be liable for the whole damages, but a satisfaction made by any one of them will be a discharge of all." [482] This rule applies to an unauthorized levy. All persons, whether parties in interest or not, who participate in the levy are trespassers.[483] It is not essential to the maintenance of the joint liability of the defendants that all acted under a single writ or for the purpose of enforcing a single demand, or that the wrongful levies be made at the same time, or even on the same day. If several successive writs are placed in the hands of the same officer, there is no presump-

[478] West v. Shockley, 4 Harr. (Del.) 287; Averill v. Williams, 1 Denio, 501; Coe v. Higdon, 1 Disn. 393; Hopkins v. Smith, 7 J. J. Marsh. 263; Lothrop v. Arnold, 25 Me. 136, 43 Am. Dec. 256; Hyde v. Cooper, 26 Vt. 552; Adams v. Freeman, 9 Johns. 117; Fitler v. Fossard, 7 Pa. St. 540, 49 Am. Dec. 492; Gunz v. Heffner, 33 Minn. 215; Teel v. Miles, 51 Neb. 542; Murray v. Mace, 41 Neb. 60, 43 Am. St. Rep. 664; Marks v. Cullmer, 6 Utah, 419; Thomas v. Town of Grafton, 34 W. Va. 282, 26 Am. St. Rep. 924.

[479] Armstrong v. Dubois, 1 Abb. App. 8.

[480] Murray v. Mace, 41 Neb. 60, 43 Am. St. Rep. 664; Canifax v. Chapman, 7 Mo. 175; Snydacker v. Brosse, 51 Ill. 357.

[481] Stewart v. Wells, 6 Barb. 79; Chambers v. Clearwater, 1 Abb. App. 341; Goodyear v. Williston, 42 Cal. 11; Wurmser v. Frederick, 62 Mo. App. 634; Castle v. Ford, 53 Neb. 507.

[482] Davidson v. Dallas, 8 Cal. 253.

[483] Youngs v. Moore, 7 J. J. Marsh. 646; Merrill v. Near, 5 Wend. 237; Britton v. Cole, 12 Mod. 178; MacVeagh v. Bailey, 29 Ill. App. 606; Brown v. Carroll, 16 R. I. 604.

Digitized by Google

tion that the parties thereto are acting jointly.[484] If, however, there is an apparent concerted action between the plaintiffs in the different writs and a division between them of the proceeds of the sale of the property seized, and a joint defending of the acts done, all may properly be regarded as joint trespassers, if the acts were unlawful.[485] There is still less difficulty in maintaining the joint liability of several plaintiffs, when all are represented by the same attorney, and place their writs in the hands of the same officer at nearly the same time, and levies thereunder are made at the same hour.[486] Though it be conceded that each of the plaintiffs proceeded separately and without any concerted action, all may be held jointly answerable, if "in the single trespass which was committed, and which was the act of the sheriff, their common agent, each participated to the same extent, and each accepted benefits resulting from the trespass." [487] "The wrong in such case consists in the levy and seizure of the property, which was done by the same officer, at the same time, for each and all of the attaching creditors." [488]

A citizen summoned by an officer to assist in an arrest is held blameless, whether the officer is justified or not.[489] This rule does not extend to levies on execution.[490] A plaintiff may be held liable for a levy di-

[484] Brewster v. Gauss, 37 Mo. 518.

[485] Leeser v. Boeckhoff, 33 Mo. App. 223.

[486] Conrad v. Fisher, 37 Mo. App. 352.

[487] Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118.

[488] Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727; Cole v. Edwards, 52 Neb. 711.

[489] McMahan v. Green, 34 Vt. 69.

[490] Hooker v. Smith, 19 Vt. 151, 47 Am. Dec. 679; Elder v. Morrison, 10 Wend. 128, 25 Am. Dec. 548.

Digitized by Google

rected by any one having authority to use his name. Thus, if he authorizes an attorney to act for him in enforcing the collection of his judgment, he is responsible for whatever the attorney may direct in his name.[491] In case of an unauthorized levy, both the attorney who directed it and the principal for whom he acted will be held as trespassers.[492] But an attorney, like the plaintiff, is not answerable for a mistake of the officer which he did not direct, and hence cannot be held liable when an officer acts beyond the command of the writ without the instigation of the attorney.[493] So, where an assignee of a judgment is authorized by law to proceed in the name of his assignor, the latter is liable for a wrongful levy made in his name.[494] A partnership is responsible for a levy made under a judgment in its favor, under the direction of one of its members.[495]

In the majority of the cases wherein plaintiffs have been held responsible for wrongful levies, they incurred their responsibility, not by directing, but by ratifying, the unlawful acts of the officers. In England and in Canada the ratification of these acts cannot by relation make the ratifiers liable as trespassers.[496] In the

[491] Armstrong v. Dubois, 1 Abb. App. 8; Newberry v. Lee, 3 Hill, 523; Barker v. Braham, 3 Wils. 368; Bates v. Pilling, 6 Barn. & C. 38; Crook v. Wright, Ryan & M. 278; Foster v. Wiley, 27 Mich. 244.

[492] Arnold v. Phillips, 59 Ill. App. 213; Hardy v. Keeler, 56 Ill. 152; Rowles v. Senior, 8 Q. B. 777; 10 Jur. 354; 15 L. J. Q. B. 231. But it seems to be otherwise where the attorney does not direct the levy, except under express instructions from his client. Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83.

[493] Marks v. Culmer, 6 Utah, 419.

[494] Brown v. Feeter, 7 Wend. 301; Hodges v. Biggs, 2 A. K. Marsh. 220.

[495] Chambers v. Clearwater, 1 Abb. App. 341.

[496] Wilson v. Tummon, 6 Scott N. R. 894; Tilt v. Jarvis, 7 U. C. C. P. 145; McLeod v. Fortune, 19 U. C. Q. B. 98.

Digitized by Google

United States, on the other hand, the adoption of the official trespass makes the persons adopting it liable to the same extent as if originally participants therein. This adoption may be made in express terms, or it may be inferred from the fact that the plaintiff, with knowledge of the facts, directs the continued holding of the property, or attends and bids at the sale, or receives and retains the proceeds thereof.[497] An officer may be induced to make a levy, or after levy may be induced to retain the property and make a sale thereof, by the giving to him of a bond of indemnity. If so, the principal and sureties in the bond become trespassers in the event that the act of the sheriff is found to be a trespass.[498] Thus in an action in New York against persons who had executed a bond of indemnity, the court said: "It was in consequence of receiving this bond that the sheriff proceeded to make the levy and sale, and if that was wrongful, these defendants were responsible therefor. The bond contemplated such a seizure and sale, and was a virtual request to the sheriff to proceed accordingly. What the sheriff did was, therefore, in effect, done under the direction and with the advice and concurrence of these defendants, and for which they are as much responsible as the sheriff would be. All who direct, request, or advise an act to be done which is wrongful are themselves wrongdoers, and re-

[497] Lewis v. Johns, 34 Cal. 629; Murray v. Blininger, 3 Abb. App. 336; Hyde v. Cooper, 26 Vt. 552; Deal v. Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Cole v. Edwards, 52 Neb. 711; Brown v. Bridges, 70 Tex. 661.

[498] Rice v. Wood, 61 Ark. 442; Briggs v. McDonald, 166 Mass. 37; Palmer v. Shenkel, 50 Mo. App. 571; Walker v. Wonderlick, 33 Neb. 504; Grant v. Tefft, 8 N. Y. Supp. 465, 29 N. Y. St. Rep. 496; Dyatt v. Hyman, 129 N. Y. 351, 26 Am. St. Rep. 533; Van Dewater v. Gear, 47 N. Y. Supp. 508, 21 App. Div. 503.

Digitized by Google

sponsible for all damages." [499] "In general, all who aid and abet the commission of a trespass are liable jointly or severally, at the election of the party entitled to the action. But where one acts only in the execution of the duties of his calling or profession, and does not go beyond it, and does not actually participate in the trespass, he is not liable, though what he does may aid another party in its commission." [500] Hence an attorney who directed a levy, and executed a bond of indemnity in behalf of his clients, and in pursuance of express instructions received from them, was adjudged not to be a cotrespasser with them.

The liability of the plaintiff, or persons acting in his aid, in the event that the levy made is not maintainable for any reason is the same as that of the levying officer in those cases in which he is not protected from liability by his writ, and the measure of damages in the one case is the same as in the other as a matter of law, although the inference of that malice and willful wrong which will sustain a claim for exemplary damages is more readily indulged against the plaintiff himself than against an officer, who, in the absence of circumstances indicating the contrary, can rarely be supposed to be influenced by personal motives. The plaintiff is not relieved from responsibility for actual damages by the fact that he confessedly acted in good faith,[501] but his good faith does relieve him from all liability for exemplary damages, where his conduct is not characterized by any wantonness or malice. He is, however, in cases where his action cannot be justified by his writ,

[499] Davis v. Newkirk, 5 Denio, 94; Ball v. Loomis, 29 N. Y. 412; Wetzell v. Waters, 18 Mo. 396; Watmough v. Francis, 7 Pa. St. 215.

[500] Ford v. Williams, 13 N. Y. 584, 67 Am. Dec. 83.

[501] Marks v. Wright, 81 Wis. 872.

Digitized by Google

answerable for the damages to the same extent as any other person would be, who, without authority, seized upon or otherwise unlawfully detained or interfered with the property.[502] Under ordinary circumstances there is no liability except for the loss actually suffered from the unauthorized levy, which, in the case of a detainer of the property, is its value, with such incidental damages as are shown to have been the actual and proximate result of the act done.[503] In Louisiana the expenses incurred by the defendant in resisting a sale of his property may be allowed.[504] In Colorado the law applicable to ordinary actions of trover or trespass is adopted as applicable to such actions, when based upon wrongful seizures of property on execution, and is said to be, that "where there is no malicious motive on the part of the defendant, but he takes the property under claim of right, and the real dispute is as to the title, the rule of damages is the value of the property at the time of the conversion or taking and interest on that sum to the time of judgment."[505] In Georgia it has been said that, "the actual damages recoverable for the wrongful seizure of personal property embraces all necessary expenses incurred in regaining possession, together with reasonable hire for the property during the time it was withheld from the owner. A part of the expense would be loss of time, if any, by the owner in

[502] Farmer v. Crosby, 43 Minn. 459; Howell v. Caryl, 50 Mo. App. 440; Dyett v. Hyman, 129 N. Y. 351, 26 Am. St. Rep. 533; State v. Smith, 119 N. C. 350; Williams v. Dodson, 26 S. C. 110; Coulson v. Panhandle N. B., 54 Fed. Rep. 855.

[503] Murray v. Mace, 41 Neb. 60, 43 Am. St. Rep. 664; Jones v. Allsbrook, 115 N. C. 46; Burris v. Booth (Tex. Civ. App.), 40 S. W. 186.

[504] Gilkerson etc. Co. v. Yale, 47 La. Ann. 690.

[505] Crymble v. Mulvaney, 21 Colo. 203; White v. Webb, 15 Conn. 302; Commonwealth v. Magnolia etc. Co., 168 Pa. St. 99.

Digitized by Google

giving necessary personal attention to the business."[506] Exemplary damages are allowable against a party guilty of insulting conduct at the time of the levy,[507] or acting in bad faith,[508] or otherwise in such a manner as to justify a finding that his conduct was actuated by actual malice or ill-will, or an indifference to the rights of the persons whose property was wrongfully seized.[509]

In a case where property was levied upon under two writs, the levy under one being rightful and that under the other being wrongful, it was held that "if the damage caused was distinguishable, that only that which was caused by the wrongful one was recoverable," but if there is but one seizure, "and it is not pretended that the damage caused was distributable, so as to be capable of being parceled out between two writs, the defendant must be allowed to recover the entire damages or he must be denied any; and as the confusion resulted from the plaintiff's wrongful act, it, rather than defendant, should suffer the consequent loss, if any there was."[510]

§ 274. Is a Levy Indispensable to a Valid Sale?—Undoubtedly, the chief object of a levy is, by some well-defined act, to take the property from the custody of the defendant, and place it in the custody of the law. Being once put in custody of the law, it is consecrated to the satisfaction of the writ. It ceases to be an article of commerce. It can no longer be sold or pledged,

[506] Jones v. Lamon, 92 Ga. 529.
[507] Treat v. Barber, 7 Conn. 274.
[508] Jones v. Lamon, 92 Ga. 529; Murray v. Mace, 41 Neb. 60, 43 Am. St. Rep. 664.
[509] Brown v. Bridges, 70 Tex. 661.
[510] Decatur F. N. B. v. Houts, 85 Tex. 69.

Digitized by Google

except in subordination to the claim of the plaintiff in execution. The interests of strangers, who might deal in the property upon their faith in the defendant's title, and in ignorance of plaintiff's lien, require that by some notorious act the period terminating the defendant's right to pledge and sell shall be clearly indicated. The interest of the plaintiff also requires the existence and evidence of some act from the date of which he can know that the property is in the custody of the law, and that the officer is responsible for its being forthcoming to respond to the exigencies of the writ. But if all these objects happen to be otherwise accomplished, is there still a necessity for a levy? Is the levy something upon which the defendant has the right to insist as a prerequisite to the divesting of his title? If the property is present at the sale, and is sold and delivered to the purchaser, can his title be defeated by showing that there was in fact no levy? The decisions from which we must judge how these questions ought to be answered are by no means satisfactory. Some of them are dicta. Many others, in which a sale was questioned, pronounced against its validity for want of a levy, in connection with other grounds on which the judgment of the court could well be supported. It seems to be certain that the defendant may waive a levy,[511] and that his waiver estops him from objecting to the sale; that in all cases where the contrary does not appear, a sufficient levy will be presumed in support of a sheriff's or constable's deed;[512] and that, so far as

[511] Trovillo v. Tilford, 6 Watts, 468, 31 Am. Dec. 484; Shamburger v. Kennedy, 1 Dev. 1; Stuckert v. Keller, 105 Pa. St. 386; Dorrance v. Commonwealth, 13 Pa. St. 164; Greer v. Wintersmith, 85 Ky. 516, 7 Am. St. Rep. 613.

[512] Evans v. Davis, 3 B. Mon. 346; Jackson v. Shaffer, 11 Johns. 513; Hartwell v. Root, 19 Johns. 345, 10 Am. Dec. 232; Estep v.

Digitized by Google

real estate may be involved, any evidence of an intent to seize or sell the property will, in support of an actual sale, sufficiently establish a valid levy.[513] There may be many instances in which the courts will refuse to hear evidence offered for the purpose of defeating a sale by showing the want of a levy, because such evidence directly contradicts the return of the officer who executed the writ. But still this question remains: Is the sale invalid where it is conceded by the parties, or is established by unobjectionable evidence, that there was no levy? It must be admitted that the cases deciding or assuming that this question must be answered in the affirmative are quite numerous,[514] and that the cases answering in the negative are but few in number. In most of the affirmative cases, the property sought to be sold was not present at the sale, and was never within the control of the officer. Hence, these

Weems, 6 Gill & J. 303; Blood v. Light, 38 Cal. 653, 99 Am. Dec. 441; Smith v. Hill, 22 Barb. 656; Hamblen v. Hamblen, 33 Miss. 455, 69 Am. Dec. 358; McEntire v. Durham, 7 Ired. 151, 45 Am. Dec. 512; Gassaway v. Hall, 3 Hill (S. C.), 289.

[513] Blood v. Light, 38 Cal. 654, 99 Am. Dec. 441; Gassaway v. Hall, 3 Hill (S. C.), 289; McEntire v. Durham, 7 Ired. 151, 45 Am. Dec. 512; Hamblen v. Hamblen, 33 Miss. 455, 69 Am. Dec. 358.

[514] Jarboe v. Hall, 37 Md. 351; Buehler v. Rogers, 68 Pa. St. 9; Hughes v. Watt, 26 Ark. 228; Ware v. Bradford, 2 Ala. 682, 36 Am. Dec. 427; Elliott v. Knott, 14 Md. 134; Langley v. Jones, 33 Md. 171; Brown v. Dickson, 2 Humph. 395, 37 Am. Dec. 560; Waters v. Duvall, 11 Gill & J. 37, 33 Am. Dec. 693; Castner v. Symonds, 1 Minn. 427; Berry v. Griffith, 2 Har. & G. 345, 18 Am. Dec. 309; Newman v. Hook, 37 Mo. 207, 90 Am. Dec. 378; Yeldell v. Stemmens, 15 Mo. 443; Carey v. Bright, 58 Pa. St. 84; Brown v. Lane, 19 Tex. 203; Brown v. Pratt, 4 Wis. 513, 65 Am. Dec. 330; Alley v. Carroll, 3 Sneed, 110. In Louisiana, an actual seizure is no doubt essential to the validity of an execution sale of either real or personal property. Watson v. Bondurant referred to in 2 Cent. L. J. 371, citing Simpson v. Allain, 7 Rob. (La.) 504; Flukner v. Bullard, 2 La. Ann. 338; Corse v. Stafford, 24 La. Ann. 263; Williams v. Clark, 11 La. Ann. 761; Kilbourne v. Frellsen, 22 La. Ann. 207.

Digitized by Google

cases can hardly be regarded as in point where the property is present at the sale. We concede that a sale without a levy is so irregular that the court issuing the writ would, on proper application, interpose to prevent the sale before made,[515] or to vacate it after being made. But if no such application is made, the sale ought to be protected from collateral assault.[516] The whole policy of the law of judicial and execution sales is in favor of protecting innocent purchasers from secret vices in the proceedings. The various acts which the sheriff is by statute required to perform are generally regarded as directory merely, and not as being essential to give him power to sell. If the property is present at the sale, the purchaser has no reason to suspect that it was not seized by the officer in due form and at the proper time. If it was not so seized, this is a secret vice for which the sheriff is blamable, and for which alone he should be responsible. It ought not, and we think it does not, defeat the purchaser's title. If by some proceeding in a cause a lien has been secured or established prior to the issuing of the execution, there can be no reason for any levy thereunder, for, before any levy can be made, it is already known what property is subject to the writ. Hence, if the judgment is one foreclosing a mortgage or other lien on personal property and directing the sale of specific chattels, such sale may take place without any formal

[515] Kellogg v. Buckler, 17 Ga. 187.

[516] Blood v. Light, 38 Cal. 654, 99 Am. Dec. 441; Cawthorn v. McCraw, 9 Ala. 519; Hamblen v. Hamblen, 33 Miss. 455, 69 Am. Dec. 358; Roebuck v. Thornton, 19 Ga. 149; McEntire v. Durham, 7 Ired. 151, 45 Am. Dec. 512; Riddle v. Bush, 27 Tex. 675; Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; Coffee v. Silvan, 15 Tex. 354, 65 Am. Dec. 169; Solomon v. Peters, 87 Ga. 251, 92 Am. Dec. 69.

Digitized by Google

levy thereon.[517] If chattels have already been attached, and are held by the officer to satisfy any judgment which may be recovered in the action, there is no need, on its recovery and the issuing of an execution thereon, to make any further levy.[518] By virtue of the law existing in most, if not all, of the states, a judgment is a lien on the real property of the debtor subject to execution. Where such is the case, no additional force to the lien can be given by the levy of an execution, and its levy may be dispensed with, because, on a sale, the title of the purchaser relates to the inception of the lien of the judgment.[519]

[517] Southern C. L. Co. v. Hotel Co., 94 Cal. 217, 28 Am. St. Rep. 115; Ewing v. Hatfield, 17 Ind. 513; Smith v. Burnes, 8 Kan. 197; Patton v. Collier, 90 Tex. 115.

[518] McFall v. Buckeye etc. Assn., [illegible] Cal. 468, 68 Am. St. Rep. 47.

[519] Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; Lehnhardt v. Jennings, 119 Cal. 193.

Digitized by Google

CHAPTER XVII.

REMEDIES OF THE OFFICER WHERE THE TITLE OF PERSONALTY LEVIED ON IS DISPUTED.

§ 274a. Claim of third person, how may be made and enforced.
§ 275. Of the officer's demand for indemnity and bonds given thereunder.
§ 275a. Actions by officers to enforce indemnity.
§ 276. Summoning a jury to inquire into ownership of property.
§ 277. Trial of right of property under American statutes.
§ 278. Bills of interpleader to compel claimant to try his title.

§ 274a. Claim to Property by Third Person—How Made and Enforced.—It very frequently happens that the goods upon which a sheriff has levied, or upon which the plaintiff desires he should levy, are claimed by a stranger to the writ. This claim may be made directly to the officer; or he may, before any such claim is made to him, know that the title is disputed and doubtful. In fact, there is generally no need for a stranger to a writ, whose property has been seized, to make any demand upon, or to give any notice to, the sheriff. He may lawfully treat that officer as a wrongdoer, entitled to no indulgence and no warning.[1] Hence, in the event of the title to personal property being involved in doubt, a prudent officer will take such means as are available for his protection, without waiting for notice from persons claiming adversely to the defendant. It is not sufficient for him merely to assure himself of immunity from action by the claimant. For he has a duty to perform to the plaintiff, and this duty is to retain the property if it is subject to execution. If an officer undertaking to determine the question for himself releases the property on a claim

[1] § 254; Hexter v. Schneider, 14 Or. 184.

Digitized by Google

being made therefor, without notifying the plaintiff and giving him an opportunity to tender a bond of indemnity, the latter may recover of him any damages occasioned by such release, and the burden of proving that the property released was not subject to the writ seems to devolve upon the officer.[2] When property has been levied upon, if the sheriff releases it, or permits it to be taken out of his possession, he is answerable to the plaintiff for its value. He cannot exonerate himself by showing that it was taken from him by another officer, unless he can show that such taking was authorized. Property levied under execution was taken from the sheriff by a United States marshal, who claimed it under proceedings in bankruptcy against the judgment debtor. But the right of the sheriff to hold the property under execution was paramount, and he was therefore held liable for surrendering the property. "It was the duty of the sheriff to retain the possession and sell the property to satisfy the execution, and to take all reasonable means to protect his levy. The marshal, having without right taken the property out of the sheriff's possession, the latter could have retaken it, or maintained an action against the marshal for its conversion. So, also, he would have had a remedy against the assignee, after the property was turned over to him, upon his refusal to surrender it. It was not, therefore, a defense to the sheriff that the property was taken by the marshal. It was in no proper sense a yielding to vis major. The sheriff had a right to use all necessary force to protect his possession. . . . . Nor was he relieved from this duty, or justified in allowing the property to be taken by the marshal, by his ignorance of his legal rights; he was bound to

[2] Sage v. Dickinson, 33 Gratt. 361; State v. Langdon, 57 Mo. 353.

Digitized by Google

know and ascertain his rights under the execution and levy, and the plaintiff was not bound to instruct him." [8]

Where some statute has not supplanted the common-law rules upon the subject, no special consideration is necessary of the remedies by which one whose property has been seized under execution by virtue of a writ against another may obtain redress. He may proceed precisely as if the wrong had not been committed under any color of authority, for the writ was not directed against him or his property, and the officer is not protected by it. He whose property has been thus seized may, by action, recover its possession or for its conversion, or may treat the officer as a trespasser, and pursue him accordingly. Statutes have, however, been enacted in several of the states abrogating the common-law rule and undertaking to impose upon claimants of property certain conditions precedent to the maintenance of any action against the levying officer. Thus, section 689 of the Code of Civil Procedure of California, as amended in 1891, declares that if the property levied on be claimed by a third person as his property by a written claim, verified by the oath of the claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the officer, he is not bound to keep the property unless indemnified after a demand for indemnity, and that "no claim to such property is valid against the sheriff, or shall be received or be notice of any rights unless made as before provided." This statute is of doubtful constitutionality in so far as it undertakes to deprive a party of all remedy against the levying officer in those cases in which the

[8] Ansonia B. & C. Co. v. Babbitt, 74 N. Y. 401.

Digitized by Google

wrong may be done and the property converted before the owner has any notice of the wrongful act of the officer, and when such owner, therefore, cannot be said to have been guilty of any negligence. The statute has not, so far as we are aware, been questioned on this ground. A notice to a levying officer stating that the person giving it was the owner of the property, and had delivered it to the defendant in execution for the purpose of sale only,[4] or that he is entitled to the possession under a bill of sale, satisfies the statute.[5] In Iowa an officer is bound to levy on any property in the possession of the defendant, or upon which the plaintiff requires a levy to be made, unless such officer receives a notice in writing from some other person stating that the property belongs to him, the nature of his interest therein, how and from whom acquired, and the consideration paid therefor, and the officer is protected from liability for his levy until he receives such notice.[6] Service of the notice on the deputy sheriff who made the levy is sufficient.[7] It may also be made in such a case by a service on the principal.[8] It is said that the acceptance of the service of a notice is not an official act, and hence that such acceptance endorsed on the writ in the name of the sheriff by his deputy is not admissible to prove such service.[9] This is, to us, a strange and inexplicable decision. The notice must be given to the officer. The statute is not satisfied by reading it to him, the claimant retaining possession.[10]

[4] Vermont M. Co. v. Brow, 109 Cal. 236, 50 Am. St. Rep. 37.
[5] Dubois v. Spinks, 114 Cal. 289.
[6] St. Ia., 1897, § 3991.
[7] Burrows v. Waddell, 52 Ia. 198.
[8] Headington v. Langland, 65 Ia. 276.
[9] Chapin v. Pinkerton, 57 Ia. 236.
[10] Gray v. Parker, 49 Ia. 624.

Digitized by Google

If the notice is received by the officer, the mode of its delivery is immaterial.[11] It must describe the property claimed. A general notice not to make a levy on any personal property situate on two designated tracts of land, "the same being my individual property, or that which I have leased, and which I am in full possession of," is not sufficient. The statute requires the property to be described so that the officer can identify it.[12] A notice describing the property as a certain stock of drugs covered by a chattel mortgage, so designating the mortgage and its record that its contents may be easily ascertained, is sufficiently specific as a description of the property included in the mortgage.[13] If the notice is received and acted upon by an officer, and accomplishes its purpose of enabling him to demand and receive an indemnifying bond, imperfections therein are waived.[14] No action can be sustained against a levying officer unless a claimant has given notice in substantial conformity to that prescribed by the statute.[15] If, however, such a notice is given, the claimant may sustain the same remedies against the officer as if the statute did not exist,[16] and so may he, though no notice is given, if, as a matter of fact, an indemnity bond was given to the officer. The only object of the statute is to enable him to exact such a bond, and, whenever it has been given, it is immaterial what notice preceded it.[17]

[11] Turner v. Younker, 76 Ia. 255.

[12] Doolittle v. Hall, 78 Ia. 571.

[13] Kern v. Wilson, 82 Ia. 407.

[14] Waterhouse v. Black, 87 Ia. 317.

[15] Danforth v. Harlow, 76 Ia. 236; Bank of Reinbeck v. Brown, 76 Ia. 696; Doolittle v. Hall, 78 Ia. 571; Bradley v. Miller, 100 Ia. 169.

[16] Bank of Reinbeck v. Brown, 76 Ia. 696.

[17] Whitney v. Gammon, 103 Ia. 363.

Digitized by Google

In Louisiana a third person, knowing that his property has been levied upon by execution, may notify the levying officer of his claim, and the latter may require the claimant to make an affidavit of his claim, and thereupon the officer may demand indemnity of the plaintiff, but, if the officer does not require such affidavit on the part of the claimant, the latter is entitled to maintain an action for the subsequent sale of the property.[18]

In Minnesota if the property of a third person is levied upon, he must make an affidavit of his title thereto or his right to the possession thereof, stating its value and the ground of his right, and no claim is valid against the officer unless preceded by such affidavit.[19] This statute has, by construction, been limited to those cases in which the property, when levied upon, was in the possession of the defendant in the writ or of his agent, and hence, if the property of a stranger to the writ is taken from his possession or that of his agent, he is not affected by this statute, and may proceed as if it had not been enacted.[20] If the property is taken from the defendant in execution, compliance with the statute is essential to the maintenance of an action by a third person against the levying officer.[21] The statutes of Mississippi provide that an action of replevin shall not be maintainable in the case of the seizure of property under execution or attachment, and a remedy exists in favor of the party making the claim

[18] Wolf's Rev. Laws, La., § 3579; Macias v. Lorio, 41 La. Ann. 800.

[19] St. Minn., 1894, § 5296.

[20] Barry v. McGrade, 14 Minn. 163; Butler v. White, 25 Minn. 432; Lampsen v. Brander, 28 Minn. 526; Ohlson v. Manderfield, 28 Minn. 390; Granning v. Swenson, 49 Minn. 381.

[21] Moulton v. Thompson, 26 Minn. 120; Barry v. McGrade, 14 Minn. 163.

Digitized by Google

by some other action or proceeding.[22] Under this statute the only remedy affected is the right to sue in replevin while the property remains in the hands of the officer. A claimant may sue the officer in any other form of action,[23] or may wait until the sale is made, and maintain an action against the purchaser for the possession of the property, or for its conversion.[24]

§ 275. Of the Officer's Demand for Indemnity and Bonds Given Thereunder.—Under the English practice, there were two modes of procedure open to the sheriff when a reasonable doubt existed in regard to his right to seize or hold property under execution, and he desired to avoid both the responsibility of returning nulla bona, and the responsibility of seizing or holding the property. The first mode whch we shall describe was much more effective than the other. It consisted in demanding indemnity from the plaintiff for seizing and selling the property, and from the claimant for releasing it. This demand being refused by both parties, the officer made an application to the court out of which the writ issue. He showed to the court that disputes in reference to the title existed, and that both parties had refused to indemnify him for proceeding. It was discretionary with the court whether or not it would interpose for his protection. But this discretion seems always to have been exercised in his favor, whenever it appeared that the doubts in regard to the title were reasonable, and the motives and conduct of the officer in demanding indemnity were characterized by good faith, and were free from all suspicion of a desire to op-

[22] Code Miss. 1892, § 3735.

[23] Woolner v. Spalding, 65 Miss. 204; Conn v. Bernheimer, 67 Miss. 204; Bernheimer v. Martin, 66 Miss. 486.

[24] Armistead v. Bernard, 62 Miss. 180.

Digitized by Google

press either party, or to evade the performance of official duty. The method of protecting him was by making an order enlarging the time for the return of the writ. The length of time granted by the court varied according to the exigencies of each particular case. Sometimes the officer was allowed only such an extension of time as enabled him more thoroughly to satisfy himself as to the title; sometimes he was authorized to wait until the title was settled by litigation in another court; and sometimes "the court granted a rule for enlarging the time for the sheriff to make his return from term to term, until the sheriff should be indemnified." [25] It is obvious that this practice is in the highest degree commendable. It permits the sheriff to obtain indemnity in cases where the title is involved in substantial doubt. It thereby prevents the performance of his duties from becoming unreasonably and unnecessarily perilous. At the same time, it does not leave it to his discretion to determine when he may refuse to proceed, and thus give him an opportunity to act unfairly toward the plaintiff. Statutes have been enacted in many of the United States determining the circumstances in which officers may demand bonds of indemnity.[26] In the absence of such statutes, it is very clear that our courts, in proper cases, will inter-

[25] Watson on Sheriffs, 195-197; Venables v. Wilks, 4 J. B. Moore, 339; Thurston v. Thurston, 1 Taunt. 120; Ledbury v. Smith, 1 Chit. 294; Rex v. Sheriff of Devon, 1 Chit. 643; Shaw v. Tunbridge, 2 W. Black. 1064; Burr v. Freethy, 1 Bing. 71; 6 J. B. Moore, 79; Wells v. Pickman, 7 Term Rep. 174; MacGeorge v. Birch, 4 Taunt. 585; King v. Bridges, 7 Taunt. 294; 1 J. B. Moore, 43; Etchells v. Lovatt, 9 Price, 54.

[26] Code of Ala., § 2905; Sandel & Hill's St. Ark. 1894, §§ 3067, 3068; Starr & Curtis's St. Ill. 1896, p. 2373, § 43; Ann. St. Ia. 1897, §§ 3992, 3993; C. C. P. Kan., § 459; Code Miss., 1892, § 3482; S. C., Code Civ. Proc., § 237; Code Tenn., 1884, § 3745; Utah Rev. Stat., 1898, § 3242; Rev. Laws of Vt., 1880, § 1558.

Digitized by Google

pose to relieve sheriffs by enlarging the time for making their returns.[27] As a general rule, our practice seems more favorable to the sheriff than the English practice was. Indemnity seems to be conceded to the officer, not as a matter of discretion merely, but as a matter of right. Its refusal by the plaintiff, where reasonable doubt exists either with respect to the title or to the defendant's right to hold the property as exempt from execution, will, no doubt, in many of the states warrant the officer in not seizing or not holding the property, and he need not apply to the court to enlarge the time for making his return.[28] This rule is by no means universal. In some of the states the officer has no right to indemnity until the claim made by a stranger to the writ has been tried by a jury and found in his favor.[29] In Missouri, while there are statutory provisions in force with respect to the right of an officer to indemnity when acting under an execution, they do not apply to writs of attachment. In acting under the last-named writ an officer is entitled to such relief only as might be afforded him if acting under an execution

[27] Miller v. Commonwealth, 5 Pa. St. 297; Dewey v. White, 65 N. C. 225; Bosley v. Farquar, 2 Blackf. 61; Forniquet v. Tegarden, 24 Miss. 96; Bryan v. Bridge, 6 Tex. 143; Jessop v. Brown, 2 Gill & J. 404; Adair v. McDaniel, 1 Bail. 158; Spangler v. Commonwealth, 16 Serg. & R. 68, 16 Am. Dec. 548; Hall v. Galbraith, 8 Watts, 220.

[28] State v. Sharp, 2 Sneed, 615; Saunders v. Harris, 4 Humph. 72; Smith v. Osgood, 46 N. H. 178; Pickard v. Peters, 3 Ala. 493; Minter v. Bigelow, 9 Port. 481; Fitler v. Fossard, 7 Pa. St. 540; Marshall v. Hosmer, 4 Mass. 63; Bond v. Ward, 7 Mass. 125, 5 Am. Dec. 28; Shriver v. Harbaugh, 37 Pa. St. 399; Marsh v. Gold, 2 Pick. 290; Smith v. Cicotte, 11 Mich. 383; Commonwealth v. Vandyke, 57 Pa. St. 34; Board v. Helm, 2 Met. (Ky.) 500; Perkins v. Pitman, 34 N. H. 261; Patterson v. Anderson, 40 Pa. St. 359, 80 Am. Dec. 579; Huffman v. Leffell's Ex'rs, 32 Gratt. 41; Second N. B. v. Gilbert, 70 Ill. App. 251; Pierce v. Jackson, 65 N. H. 121; Crouse v. Bailey, 10 N. Y. Supp. 273; Commonwealth v. Rooney, 167 Pa. St. 244.

[29] Curtis v. Patterson, 8 Cow. 67.

Digitized by Google

at common law. The courts of this state, after very carefully considering the question, have denied the absolute right of the officer to indemnity, and have held that his release of chattels levied upon because indemnity was not tendered was at his peril.[30] In some of the states the claimant may be notified of the levy, and unless he prosecutes proceedings within a specified time, waives his right to redress from the officer. In these states the plaintiff cannot be required to furnish indemnity.[31] Where an officer entitled to indemnity, and holding property under two or more writs, calls upon the plaintiffs therein for indemnity, some of whom comply and others refuse, only those who comply can share in the proceeds of the sale.[32] This is because the officer has the right to release the levies of the writs whose owners are unwilling to share the responsibility of the seizure. In Minnesota the claimant may make affidavit of his claim of title. The officer may then demand indemnity, and, on its being refused, may surrender the property. The officer is not liable to a suit at the instance of a third person, until after the claim and affidavit have been made, and reasonable time has been given plaintiff to furnish indemnity.[33]

While the officer may, on the refusal or neglect of the plaintiff to indemnify him for holding the property, release the levy and return the writ unsatisfied, this does not establish the claimant's title, nor in any way estop the plaintiff from levying on the same property

[30] State v. Koontz, 83 Mo. 323; State v. Rayburn, 22 Mo. App. 303; see Rev. Stat. of Mo., 1889, §§ 4297, 4298.

[31] State v. Sandlin, 44 Ind. 504.

[32] Burnett v. Handley, 8 Ala. 685; Pickard v. Peters, 3 Ala. 493; Smith v. Osgood, 46 N. H. 178; Davidson v. Dallas, 8 Cal. 227; Dewey v. White, 65 N. C. 225; Griffin v. Hasty, 94 N. C. 438.

[33] Williams v. McGrade, 13 Minn. 177.

Digitized by Google

under another writ issued upon the same judgment.[34] In Iowa an officer who has demanded and received indemnity must proceed to the execution of his writ, and will not be permitted, in an action against him for not so proceeding, to show that the property was not subject to the writ.[35] The same rule prevails in New Jersey. Upon receiving indemnity, the duty of the officer is to proceed to sell. If the plaintiff's own bond is ample security, he need not furnish a surety; and the sheriff, refusing to proceed without such surety, may be amerced in the amount of the debt and costs.[36] If the bond is given and a sale made, the officer cannot defend against an action by the plaintiff for the proceeds of the sale, by showing that the property did not belong to the judgment debtor,[37] unless a recovery has already been had against the officer for wrongfully selling the property.[38] Elsewhere an officer is never under compulsion to proceed because indemnity has been tendered. If he feels sure that the property does not belong to the defendant, or that it is not liable to execution, he may surrender it. In such case, he is not responsible to the plaintiff if his action can be shown to have been proper.[39] A bond of indemnity taken pursuant to the provisions of a statute since found to be invalid, or omitting some of the conditions prescribed by a valid statute, may, nevertheless, be enforceable as a good common-law bond.[40] The sheriff, however,

[34] Clark v. Reiniger, 66 Iowa, 507.

[35] Evans v. Thurston, 53 Iowa, 122; Cox v. Currier, 62 Ia. 551.

[36] Harrison v. Allen, 40 N. J. L. 556.

[37] Adams v. Disston, 44 N. J. L. 662.

[38] Newland v. Baker, 21 Wend. 264.

[39] Hamblet v. Herndon, 3 Humph. 34; Commonwealth v. Watmough, 6 Whart. 117; Commonwealth v. Vandyke, 57 Pa. St. 34.

[40] Flint v. Young, 70 Mo. 221; Porter's Ex'r v. Daniels, 11 W. Va. 250; Fulghum v. Connor, 99 Ga. 237.

Digitized by Google

need not accept a bond which is not in substantial conformity to the statute.[41]

The statutes in some of the states restrict the claimant of property where an indemnifying bond is given to an action on such bond;[42] but in the absence of such statutory restriction the remedy afforded by the bond is cumulative, and may therefore be disregarded by the claimant.[43] In truth, statutes which undertake to compel the owner of property to forego an action for its recovery when taken by a wrongdoer, though he assumes to act under an execution, and to restrict his right to recovering its value from some other person than such wrongdoer, are manifestly unconstitutional. Perhaps it is within the power of the legislature to enact that some notice shall be given to the levying officer of the claim of a third person, to the end that the officer may protect himself by demanding indemnity of the plaintiff, and, if it is refused, by surrendering the property to the claimant.[44] The owner may, of course, be required to prosecute his claim with reasonable diligence and so as not to inflict needless injury on an officer acting in good faith. If, however, the claimant is not chargeable with any negligence, we doubt the power of the legislature to compel him to relinquish his right of action against the levying officer and to seek redress elsewhere. If in an action of replevin to recover the property of one person taken under a writ against another, the defense is interposed that the officer has exacted a bond of indemnity, and that by the

[41] Second N. B. v. Gilbert, 70 Ill. App. 251; Kreher v. Mason, 25 Mo. App. 291.

[42] Chisholm v. Gooch, 79 Ky. 468; Sandel & Hill's St. Ark., § 3070.

[43] State v. McBride, 81 Mo. 349; Belkin v. Hill, 53 Mo. 492; Howard v. Conde, 22 Or. 581.

[44] Cheadle v. Guittar, 68 Ia. 680.

Digitized by Google

statute the sole remedy of claimant must be sought under such bond, it is evident that, if the statute can be sustained, a person in no respect in fault is required to part with title to his property, and to accept in place thereof the bond of a stranger to pay therefor. In determining that such a statute could not be enforced, the supreme court of Iowa said: "By the pretense that the property in question belonged to the defendants in execution, the officer levied upon and took possession of the property of the plaintiffs. The latter are thereby deprived of such property without a trial, 'without having had their day in court,' without a pretense that the forms and proceedings known to the law have been complied with, and, in effect, the plaintiffs are compelled to sell their property on the market, whether they so desire or not. The process in the defendant's hands did not authorize him to take the plaintiffs' property, and therefore, for the purposes of this case, it cannot be regarded as due process of law." [45] Subsequently, in the same state, the question was presented whether a statute of the character here under consideration had efficacy to destroy the right of action against the wrongdoer to recover a personal judgment against the levying officer for the injuries suffered by his wrong. In answering in the negative this question, the court said: "The provision, if it be enforced, would bar a remedy against an officer who seizes goods that are not subject to the execution in his hands, for the reason that they are not the property of the defendant against whom the writ issues. When the property is seized under such circumstances, the officer is a trespasser. His writ does not authorize him to seize the property. The owner has a valid claim against him for

[45] Foule v. Mann, 53 Ia. 42; McClain's St. Ia., § 4283.

Digitized by Google

the value of the goods seized. This claim, of course, is the property of the owner of the goods. We know of no power possessed by the legislature to deprive the owner of the goods of this property right which he holds against the officer. Surely the legislature could not, by enactment, provide that a debtor, by making prescribed arrangements with another person, could cause such person to be substituted as the debtor and himself escape liability to the creditor. Yet this is the precise thing the statute in question aims to accomplish. It declares that the trespasser shall cease to be the debtor of the party whose goods are wrongfully taken, if other persons will, in the manner prescribed, take his place. It is no reply to this argument to insist that the statute is intended for the protection of the officers of the law. The law does not and ought not to protect them when they violate the rights of property of persons against whom they have no writs. But they have ample protection by the indemnifying bonds which they may demand. If these bonds are sufficient, they can suffer no loss. We think the statute, if enforced so as to bar actions against ministerial officers in cases like the one before us, would result in gross abuses and oppression." [46]

By the codes of Virginia and West Virginia, after receiving notice of a claim to property levied upon, the officer may notify the plaintiff that an indemnity bond is required. A bond may then be given, payable to the officer, with condition to indemnify him against all damages which he may sustain in consequence of the seizure or sale of the property, and to pay the claimant all damages which he may sustain, and to warrant and defend the title of any purchaser of the property. If

[46] Craig v. Fowler, 59 Ia. 200.

Digitized by Google

the bond is not given within a reasonable time, the officer may release the property, if already levied upon, or may refuse to levy if no levy has been made. The claimant of the property is barred of any action against the officer levying, provided the security shall be good at the time of taking it.[47] It will be seen that these statutes are subject to the objections as to their constitutionality sustained by the supreme court of Iowa hereinbefore referred to.

Where the condition of a bond of indemnity is that the obligors shall "well and truly indemnify and save harmless the obligee of and from all suits, damages, and costs whatever, whereto he may be liable or obliged by law to pay to any person or persons by reason of said attachment," etc., a breach of the bond occurs on the recovery of judgment against the obligee, and vests him with a cause of action against the obligors, whether he has paid such judgment or not.[48] The same result follows the giving of an indemnity bond to save the officer harmless against "all judgments, damages, and costs that may be awarded against him by any court or tribunal for or on account of making a" levy on the property designated.[49] An officer may sometimes maintain an action against a plaintiff for indemnity, though no bond has been sought nor given. If the officer acts under the writ without any special directions from plaintiff, and is thereafter compelled to pay damages for an unlawful levy, he has no recourse

[47] Code of Va., 1887, §§ 3001, 3002, 3003; Code W. Va., 3d. ed., ch. 107, §§ 2, 3.

[48] White v. French, 15 Gray, 339; Cook v. Merrifield, 139 Mass. 139; Showers v. Wadsworth, 81 Cal. 275; Jones v. Childs, 8 Nev. 121; Briggs v. McDonald, 166 Mass. 37; Bancroft v. Winspear, 44 Barb. 209.

[49] Armour P. Co. v. Orrick, 4 Okla. 661.

Digitized by Google

against the plaintiff beyond recovering back the money he has paid to plaintiff as the proceeds of the levy.[50] But if the plaintiff directs the levy, the rule is otherwise. If the sheriff follows plaintiff's directions in doing an act not known to him to be unlawful, and is thereafter compelled to respond in damages because of the act, he may recover from the plaintiff the amount so recovered from him.[51] To entitle the officer to such recovery, it is not sufficient that a judgment has been entered against him for the damages occasioned by the unlawful levy. Such judgment must also have been satisfied.[52]

§ 275 a. Actions by Officers to Enforce Indemnity.— An officer in the execution of a writ, in so far as he acted by the direction of the plaintiff, is entitled to be treated as an agent of the latter and to the benefit of the general rule of law that a principal impliedly undertakes to indemnify his agent for liabilities which the latter may incur in obeying the mandates of his principal. When an officer, on receiving a writ, acts without any express instructions from the plaintiff, there can be no implication that the plaintiff has intended that the officer should do any act not warranted by the writ, and, if he does such an act, he cannot compel the plaintiff to reimburse him for the injurious consequences thereof,[53] but when a principal has directed an act to be done, and the agent is subjected to loss by the doing of it in

[50] Wilson v. Milner, 2 Camp. 452; Nelson v. Cook, 17 Ill. 443; Fitler v. Fossard, 7 Pa. St. 540.

[51] Humphreys v. Pratt, 2 Dow & C. 288; 5 Bligh, N. S., 154; Sanders v. Hamilton, 3 Dana, 550; Stoyel v. Cady, 4 Day, 226.

[52] Williams v. Mercer, 139 Mass. 141; Oaks v. Schiefferly, 74 Cal. 478.

[53] Nelson v. Cook, 17 Ill. 443; Fitler v. Fossard, 7 Pa. St. 540, 49 Am. Dec. 492.

Digitized by Google

the manner directed, there is an implied promise on the part of the principal to indemnify him, and this promise may be enforced by any appropriate action. Hence, a plaintiff under whose direction an officer has levied upon property of a third person, or upon property of the defendant which is exempt from, or not subject to, execution, is liable to such officer for the injuries resulting to him, without the execution of any formal bond or obligation whatever, and upon the implied obligation to indemnify.[54]

It must be remembered in considering all contracts of indemnity, however expressed, that the law will not tolerate any agreement having for its object the commission of a known wrong. Hence, it is essential to the validity of every bond or other agreement for indemnity that there was no doubt respecting the validity of the act in question, for if the parties knew, or were chargeable with knowledge, that it was criminal or unlawful, or necessarily constituted a trespass or an invasion of the just rights of another, there can be no contract, whether expressed or implied, that the agent shall, by his principal, be indemnified for the doing of such act.[55]

In a few of the states their statutes provide that an

[54] Moore v. Appleton, 26 Ala. 633; Nelson v. Cook, 17 Ill. 443; Gower v. Emery, 18 Me. 79; Kenyon v. Woodruff, 33 Mich. 310; Fitler v. Fossard, 7 Pa. St. 540, 49 Am. Dec. 492.

[55] Collier v. Windham, 27 Ala. 291, 62 Am. St. Rep. 767; Stark v. Raney, 18 Cal. 622; Buffendeau v. Brooks, 28 Cal. 641; Porter v. Stapp, 6 Colo. 32; Marcy v. Crawford, 16 Conn. 549, 41 Am. Dec. 158; Nelson v. Cook, 17 Ill. 443; Jose v. Hewett, 50 Me. 428; Babcock v. Terry, 97 Mass. 482; Kenyon v. Woodruff, 33 Mich. 310; Harrington v. Crawford, 61 Mo. App. 224, 136 Mo. 472, 58 Am. St. Rep. 653; Riley v. Whittiker, 49 N. H. 145, 6 Am. Rep. 474; Griffiths v. Hardenbergh, 41 N. Y. 464; Coventry v. Barton, 17 Johns. 142, 8 Am. Dec. 376; Hopkinson v. Leeds, 78 Pa. St. 396; Holman v. Johnson, 1 Cowp. 341.

Digitized by Google

action upon a bond of indemnity may be brought by the claimant of the property.[56] In the absence of statutes of this character, he may undoubtedly maintain an action against the sureties upon the bond, upon the theory that, by joining therein, they have made themselves cotrespassers with the levying officer.[57] But we apprehend that in such a case the action would not be based upon the bond as a contract, but would merely be in tort, treating the officer, the plaintiff, and the sureties on the bond of indemnity as joint tort feasors. In some of the states the practice has been adopted by the claimant of taking an assignment of the bond in discharge of the judgment recovered by him against the levying officer, and there is no doubt that where the claimant so does, he may maintain an action on the bond thus assigned against the sureties thereon.[58] Where the statute permits the claimant to sue directly upon a bond, he must, if the action is at law, be a person having a legal, as contradistinguished from an equitable, cause of action, and must be one who, had the bond not been given, could have maintained an action against the levying officer for the wrong of which complaint is made.[59] However general the language of the bond of indemnity, it will be presumed, in the absence of circumstances indicating a contrary purpose, that it was intended to indemnify the levying officer for retaining possession, and making sale of, property already levied upon, and levies sub-

[56] Chisholm v. Gooch, 79 Ky. 468; Gunn v. Gudehus, 15 B. Mon. 447; Shattuck v. Miller, 50 Miss. 386; Williams v. Simons, 70 Fed. Rep. 40.

[57] Ante, § 273.

[58] McBeth v. McIntyre, 57 Cal. 49; White v. French, 15 Gray, 339; Howe v. Freidheim, 27 Minn. 294.

[59] Moore v. Allen, 25 Miss. 363; Marshall v. Stewart, 67 Miss. 494.

Digitized by Google

sequently made will not subject the sureties thereon to liability.[60] In doubtful cases the bond seems to be construed in favor of the sureties and so as not to subject them to liability for acts of which they had no knowledge, and which, therefore, they cannot be deemed to have authorized or ratified, nor for any acts of trespass which do not appear to have been contemplated by the bond.[61] They are not answerable to the levying officer on account of any liability or loss occasioned him through his own negligence or that of his deputy or other agents.[62] Where the officer claims to have been subjected to liability through a judgment recovered against him, the sureties may always defend on the ground that such judgment was permitted through his default, collusion, or fraud, or in consequence of any previous understanding between him and the plaintiff in the action.[63]

Where a bond is for a penal sum or limited to an amount designated, no recovery can be had thereunder in excess of such amount and interest.[64] Provided that the amount of the recovery can in no event exceed the amount designated by the bond, the general rule is, that the measure of recovery or of damages, where the claimant of property is permitted to sue upon the bond, is precisely the same as if no bond had been given, and such claimant brought his action directly

[60] Clark v. Woodruff, 18 Hun, 419; Reilly v. Coleman, 62 How. Pr. 289; Alston v. Conger, 66 Barb. 272.

[61] Chapman v. Douglas, 15 Abb., N. S., 421; Clark v. Woodruff, 83 N. Y. 518.

[62] Briggs v. McDonald, 166 Mass. 87; Smokey v. Peters, 66 Miss. 471, 14 Am. St. Rep. 575.

[63] Mihalovitch v. Barlass, 36 Neb. 491; Armour P. Co. v. Orrick, 4 Okla. 661.

[64] Griffiths v. Hardenbergh, 41 N. Y. 464.

Digitized by Google

against the levying officer.[65] When, instead of the claimant suing upon the bond, an action is first brought by him against the levying officer, and judgment therein recovered, the measure of recovery on his part, when in turn he brings an action against the sureties on the bond, must necessarily be the amount of such judgment, together with the expenses necessarily incurred by him in defending the action, and also such additional damages, if any, as may have proximately resulted to him from his seizure or sale of the property on account of which the bond of indemnity was given.[66] In the costs of defending an action which the officer is entitled to recover of the sureties attorneys' fees are generally included.[67] If the officer has, through the sale of the property, received any money, this fact may be proved in mitigation of damages, and he must then assume the burden of proving the disposition made by him of such moneys, and that it was such that the sureties ought not to be entitled to have it considered in diminution of the damages for which they would otherwise be answerable.[68]

§ 276. Summoning a Jury to Inquire into the Ownership of Property.—The second mode of procedure resorted to by sheriffs in England, when the title to personalty was doubtful, was to impanel a jury to inquire and render their verdict as to the fact of ownership. This mode seems to have been too barren in its results to warrant any one in resorting to it. Their verdict

[65] Moore v. Allen, 25 Miss. 133; Shattuck v. Miller, 50 Miss. 386.

[66] Graves v. Moore, 58 Cal. 435; Stark v. Raney, 18 Cal. 622; Chamberlain v. Beller, 18 N. Y. 115; Evans v. Graham, 37 W. Va. 657.

[67] Tunstead v. Nixdorf, 80 Cal. 647; Brinker v. Leinkauff, 64 Miss. 236; Schmick v. Noel, 72 Tex. 1; Brotton v. Lunkley, 11 Wash. 581.

[68] O'Brien v. McCann, 58 N. Y. 373.

Digitized by Google

was never thought to be conclusive for or against the claimant. It was for some time believed, when in favor of the claimant, to justify the officer in abandoning possession of the property,[69] and, when in favor of the officer, to be sufficient to mitigate the damages in a subsequent action for the unlawful taking.[70] Perhaps for this last purpose it may still be admissible in evidence; but it can no longer be regarded as a sufficient defense to an action against the officer for a false return of nulla bona.[71] The practice of summoning a jury to inquire into the ownership of property, though leading to little or no practical result at common law, has been very generally adopted in the United States. The verdict of the jury in this country in such a proceeding, though rarely conclusive upon the title to the property, is nevertheless attended by important consequences to which it never led at common law. We therefore deem the subject of the trial of the right of property under American statutes worthy of separate consideration, and hence reserve it for the section succeeding this.

§ 277. Trial of Right of Property under American Statutes.—The policy of the American statutes in reference to the trial of the right of property seized under execution is not uniform. Some of them seem to have been conceived for the protection of the claimant, and others for the protection of the officer. Most of them furnish a remedy which, for whosoever's benefit intended, exhibits its impartiality in being alike inadequate to

[69] Farr v. Newman, 4 Term Rep. 633; Roberts v. Thomas, 6 Term Rep. 88; Gilbert on Executions, 21; Dalton on Sheriffs, 146; Bingham on Judgments and Executions, 244; Wells v. Pickman, 7 Term Rep. 176.

[70] Latkow v. Eamer, 2 H. Black. 437.

[71] Glossop v. Pole, 3 Maule & S. 175; Watson on Sheriffs, 198.

Digitized by Google

fully subserve the interests or protect the rights of either party. Under the majority of these statutes the claimant is free to resort to his common-law remedies, and cannot be compelled to submit his claim to be investigated by the statutory method.[72] Under some of them, however, the officer has the privilege of instituting the proceedings, and may, therefore, compel the claimant to try his right in the manner prescribed by the statute.[73] There are states, however, in which the trial of the right of property is of serious import, and in which the judgment is conclusive of the rights of the parties.[74] Thus, in several of the states the claimant is permitted to make the claim under oath and to give bond with sureties, and thereupon to remain in possession of the property, if it has not already been levied upon, or to have possession returned to him, if such levy has been made. An issue is then made up between the parties and tried in some court of competent jurisdiction, and a judgment entered for or against the claimant. If in his favor, he is entitled to the possession of the property. If against him, he must surrender it to the officer, and, if such surrender is not made within a time specified in the statute, the bond on behalf of the claimant is returned forfeited, and he and his sureties become answerable, and generally, execution may issue upon the bond itself without resorting

[72] Moore v. Gammel, 13 Tex. 120; Bradley v. Halloway, 28 Mo. 150; Steele v. Farber, 37 Mo. 71; Mason v. State Bank, Breese, 183; Jones v. Wilson, 16 Ohio St. 420; Pike v. Colvin, 67 Ill. 227.

[73] Phillips v. Harriss, 3 J. J. Marsh. 122, 19 Am. Dec. 166; State v. Sandlin, 44 Ind. 504.

[74] Oden v. Stubblefield, 2 Ala. 684; Roberts v. Heim, 27 Ala. 678; Lenoir v. Wilson, 36 Ala. 600; Stevens v. Springer, 23 Mo. App. 375; Martin v. Harnett, 86 Tex. 517; Sayle's Tex. Civ. St., 1897, §§ 5307, 5308.

Digitized by Google

to any further or different action.[75] There are other states in which the importance of the proceeding is that it justifies the officer in delivering possession to the claimant, if the verdict or judgment is in his favor, and no bond of indemnity is tendered to the officer,[76] and others in which, if the verdict is against the claimant, the officer cannot be held liable to him for the subsequent sale of the property, and he must seek redress against other parties.[77] The claim to the property need not be made by the claimant in person. He may act by an agent, and that agent may be the defendant in the writ. This often happens when the goods in the custody of a bailee are seized as his property. In such a case the bailee may claim the property for and in the name of the owner.[78] A cotenant may claim for himself and his cotenant.[79] A landlord who distrains goods may claim the same from an officer subsequently levying.[80] In Missouri the claim may be made by the beneficiary in a deed of trust;[81] but in Alabama the court adheres to the rule that it can look alone to the legal title, and, therefore, holds that a cestui que trust of personal property cannot interpose a claim to try the

[75] Code Ala., §§ 3004, 3008; Sandel & Hill's St. Ark., 1894. §§ 3088 to 3093; Rev. St. Mo., 1889, §§ 4927, 4928; Pepper & Lewis Pa. St., Supp. 1897, p. 294, § 1; Sayle's Tex. Civ. St., 1897, §§ 5286, 5307, 5308; Ballinger's Codes & St. Wash., § 5262.

[76] Neb. Code Civ. Proc., 1897, § 488; Nev. Code Civ. Proc., 1885, § 220; N. J. Genl. Stat., 1895, p. 1421, § 32; N. Y. Code Civ. Proc., §§ 1418-1422; N. D. Code Civ. Proc., ed. 1895, § 321; Rev. Stat. Ohio, 7th ed., § 5444.

[77] Starr & Curtis's St. Ill., 1896, pp. 2381, 2382, §§ 67-79; N. J. Genl. St., 1895, p. 1421, § 32; Rev. St. Oh., 7th ed., § 5444; Hill's Ann. Laws of Or., 2d ed., §§ 286, 287, 289; Pepper & Lewis Pa. Stat., Supp. 1897, p. 294, §§ 1, 2, 3, 13, 16.

[78] Walmsley v. Hubbard, 24 Tex. 612; Webber v. Brown, 38 Ill. 88; Strode v. Clark, 12 Ala. 621.

[79] Cotton v. Thompson, 21 Ala. 574.

[80] Grimsley v. Klein, 1 Scam. 343.

[81] State v. McKellop, 40 Mo. 184; State v. Koch, 47 Mo. 582.

Digitized by Google

right of property.[82] The claimant must have the legal title or the right to the possession.[83] Hence, one holding a mortgage or other lien on the property is not entitled to the benefit of the statutes here under consideration, unless, when the levy was made, he was in possession of the property, or the terms of his contract give him the right to such possession when his claim is interposed.[84] A trial of the right of property may be prosecuted in the name of an infant by a prochein ami.[85] The claim cannot be interposed by one of the defendants in execution, for the purpose of determining whether the property belongs to him individually, or to him and his codefendants as partners.[86]

Persons having estates in the property, but not entitled to the immediate possession, are not competent to institute statutory proceedings to try the right of property,[87] because the defendant in such a case, having an estate in possession, has an interest subject to levy and sale. In some of the states, the trial of the right of property takes place before a jury summoned by the levying officers; in others, it is conducted by a justice of the peace, acting with the aid of a jury. Notice of the time and place of trial must be given.[88] The only issue to be tried is, Does the property belong to the claimant?[89] Hence, he cannot show that the

[82] King v. Hill, 20 Ala. 135.

[83] White v. Jacobs, 66 Tex. 462; Willis v. Thompson, 85 Tex. 301; Wilber v. Kray, 73 Tex. 533.

[84] Garrity v. Thompson, 64 Tex. 598; Wilber v. Kray, 73 Tex. 533.

[85] Strode v. Clark, 12 Ala. 621.

[86] Pierce v. Kingsbury, 63 Mo. 259.

[87] Allen v. Russell, 19 Tex. 90; Hamilton v. Mitchell, 6 Blackf. 131; Philbrick v. Goodwin, 7 Blackf. 18.

[88] Ice v. McLain, 14 Ill. 62.

[89] Marshall v. Cunningham, 13 Ill. 20; Price v. Sanchez, 8 Fla. 136.

Digitized by Google

property belongs to a third person.[90] For if it did so belong, this fact would by no means entitle the claimant to its possession, nor to interfere in behalf of the owner, unless acting in his name and as his agent. Neither will it avail the claimant to show that the judgment or execution is void, irregular, or unsatisfied.[91] Neither of these facts ordinarily tends to establish any right of possession in the claimant. If, because of either of these facts, the officer is not entitled to retain possession of the property as against the true owner, this is no reason why he should turn it over to a stranger to the title. If the claimant was in possession when the levy was made he is doubtless entitled to be restored thereto, whether the owner of the property or not, if the defendant in execution has no interest in the property and no right to its possession.[92] Sometimes, however, the claimant's title is derived from the defendant in execution, and may depend for its validity on the question whether the writ or judgment against

[90] Beers v. Dawson, 8 Ga. 556; Robinson v. Schly, 6 Ga. 515; Dent v. Smith, 15 Ala. 286; Foster v. Smith, 16 Ala. 192; Frow v. Downman, 11 Ala. 880; McGrew v. Hart, 1 Port. 175; Forsyth v. Marbury, R. M. Charlt. 324; Treadway v. Treadway, 56 Ala. 390; Starnes v. Allen, 58 Ala. 316; Stirks v. Johnson, 99 Ga. 298.

[91] Sheldon v. Reihle, 1 Scam. 519; Webb v. Mallard, 27 Tex. 80; Dexter v. Parkins, 22 Ill. 144; Deloach v. Myrick, 6 Ga. 410; Taylor v. Branch Bank, 14 Ala. 633; Brown v. Hurt, 31 Ala. 146; Price v. Sanchez, 8 Fla. 136; Harrison v. Singleton, 2 Scam. 21; Bettis v. Taylor, 8 Port. 564; Huff v. Cox, 2 Ala. 310; Fryer v. Dennis, 2 Ala. 144; Harrell v. Floyd, 3 Ala. 16; Portis v. Parker, 22 Tex. 699; Carlton v. King, 1 Stew. & P. 472, 23 Am. Dec. 295; Stone v. Stone, 1 Ala. 582; Asher v. Fredenstein, 19 La. Ann. 256; Merricks v. Davis, 6 Chic. L. N. 399; 65 Ill. 319; Pace v. Lee, 49 Ala. 571; White v. Sheffield etc. R. Co., 90 Ala. 253; Baars v. Creary, 23 Fla. 311; Livingston v. Wright, 68 Tex. 706. But in Alabama it appears that the claimant may urge that the writ is void. Jackson v. Bain, 74 Ala. 328; Sandlin v. Anderson, 76 Ala. 403; Brightman v. Meriweather (Ala.), 25 So. 994.

[92] Southern M. Co. v. Brown (Ga.), 33 S. E. 78.

Digitized by Google

the defendant is void or not. So the property, when seized, may have been in the possession of the claimant. In such a case, even conceding the claimant not to be the true owner, the officer has no right to disturb his possession, unless acting under a writ valid as against the true owner. Hence, it sometimes happens that, on a trial of the right of property, the claimant is permitted to show that the judgment or execution is void or satisfied.[93] It also happens in some of the states that the issues to be tried are not restricted to the mere ownership of the property. This is necessarily so when the statute authorizes the recovery by either party of the damages sustained by him, or of the value of the property in controversy, or of some penalty based upon such value. In such cases the issues must necessarily be coextensive with the relief authorized to be given.[94] In New York, when property is claimed by a third person, the officer may summon a jury to determine the right of property.[95] The determination of the jury, when made, is not conclusive evidence, and probably not evidence at all, in any proceeding involving the title to the property.[96] It has not the effect of a judicial proceeding. Its only consequence is that, if in favor of the claimant, the officer may demand indemnity from the plaintiff, and may surrender the property

[93] Robinson v. Schly, 6 Ga. 515; Blount v. Traylor, 4 Ala. 667; Latham v. Selkirk, 11 Tex. 314; Webb v. Mallard, 27 Tex. 80.

[94] Schluter v. Jacobs, 10 Colo. 449; Turner v. Lytle, 59 Md. 199; Neill v. Billingsley, 49 Tex. 161; Fort Worth P. Co. v. Hitson, 80 Tex. 216.

[95] Curtis v. Patterson, 8 Cow. 67; Ball v. Pratt, 36 Barb. 402; Platt v. Sherry, 7 Wend. 236; Bayley v. Bates, 8 Johns. 184. This was formerly the law of California. Strong v. Patterson, 6 Cal. 156; Davidson v. Dallas, 8 Cal. 227; Cal. Code Civ. Proc., § 689.

[96] Perkins v. Thornburgh, 10 Cal. 189; Sheldon v. Loomis, 28 Cal. 122; Williams v. Lowndes, 1 Hall, 579; Van Cleef v. Fleet, 15 Johns. 147; Townsend v. Phillips, 10 Johns. 98.

Digitized by Google

if the indemnity is refused. Until the verdict of the jury, the officer cannot compel the execution of a bond of indemnity.[97] If, however, the plaintiff, waiving the calling of the jury, executes such a bond, it may be enforced.[98] In Ohio, an officer levying on goods claimed by a stranger to the writ must give notice of the levy and claim to a justice of the peace. The justice then summons a jury of five. Notice is given of the time and place of trial. If the verdict is in favor of the claimant, the property is restored to him, unless plaintiff gives him a bond in double the value of the property.[99] When this bond is given the claimant, the officer is not liable for proceeding to sell.[100] If the property is returned to the claimant, he may, nevertheless, recover for damages resulting from the unlawful seizure and detention.[101] A verdict in favor of the claimant is not conclusive evidence for him in a subsequent action against the officer for the unlawful caption and conversion of the property.[102] Where the verdict is against the claimant, he cannot afterward recover the goods from the officer, nor their value in damages.[103]

In most of the states a trial of the right of property resulting in a verdict against the claimant, while it does not preclude him from proceeding against the plaintiff, nor any one else into whose hands the property may come, does exonerate the levying officer from liability in proceeding to hold and sell the property

[97] Curtis v. Patterson, 8 Cow. 67.

[98] Chamberlain v. Beller, 18 N. Y. 115; Miller v. Rhoades, 20 Ohio St. 494; Denson v. Sledge, 2 Dev. 136.

[99] Glauque's Rev. Stats. Ohio, 7th ed., §§ 5444-5446.

[100] Moses v. Brashears, 2 Handy, 36; Ralston v. Oursler, 12 Ohio St. 105.

[101] Abbey v. Searles, 4 Ohio St. 598.

[102] Armstrong v. Harvey, 11 Ohio St. 527.

[103] Patty v. Mansfield, 8 Ohio, 370.

Digitized by Google

under the writ.[104] But in Ohio this result is denied, if the trial was demanded by the officer, and not by the claimant.[105] After a verdict in favor of the claimant, the officer may, in Illinois, proceed to sell; but by so doing he incurs the peril of being responsible if the property is found to belong to the claimant in any subsequent action.[106] In Kentucky the officer need not demand a jury. He may surrender possession to the claimant without any trial. By so doing he becomes liable to the plaintiff, in case the surrender ought not to have been made.[107] Under the Pennsylvania Interpleader Act of 1848, a judgment on the trial of the right of property is as conclusive as a judgment in any other proceeding.[108] In Texas the claimant must make affidavit that his claim is in good faith,[109] and present such affidavit to the officer, and also execute a bond, with sureties,[110] payable to the plaintiff. On receipt of the bond and affidavit, the officer surrenders the property to the claimant. The writ is then returned to the court when it issued, where issues are made up and tried under the direction of the court.[111] Giving the bond is a waiver on the part of the claimant of his

[104] Hexter v. Schneider, 14 Or. 184; Remdall v. Swackhamer, 8 Or. 502; Capital L. Co. v. Hall, 9 Or. 93; Schroeder v. Clark, 18 Mo. 184; Sanders v. Hamilton, 3 Dana, 550; Cassel v. Williams, 12 Ill. 387; Brown v. Booker, 6 Dana, 441, explaining Arenz v. Reihle, 1 Scam. 340; Rowe v. Bowen, 28 Ill. 116; Limpus v. State, 7 Blackf. 43.

[105] Jones v. Carr, 16 Ohio St. 425.

[106] Foltz v. Stevens, 54 Ill. 185.

[107] Brown v. Booker, 6 Dana, 441.

[108] Bain v. Lyle, 68 Pa. St. 60; Shive v. Finn, 134 Pa. St. 158.

[109] Wright v. Henderson, 10 Tex. 204; Gillian v. Henderson, 12 Tex. 47.

[110] Carter v. Carter, 36 Tex. 698.

[111] Sayles' Tex. Civ. Stats., 1897, §§ 5286-5294. For practice in Georgia, see Raiford v. Taylor, 43 Ga. 250.

Digitized by Google

right to sue either the officer or the plaintiff for damages for taking the property.[112] The claimant, by arresting the execution of process by affidavit and bond, waives his right to prosecute his common-law remedies against the plaintiff and the officer.[113] The statutes in reference to the trial of the rights of property apply only when the property is claimed by a stranger to the writ. Hence, they do not afford any means of determining a claim of exemption from execution interposed by the defendant.[114]

[112] Howeth v. Mills, 19 Tex. 296.

[113] Mosely v. Gaines, 10 Tex. 578; Howeth v. Mills, 19 Tex. 296; Moore v. Gammel, 13 Tex. 120; Bigelow v. Smith, 28 Ga. 318; Whittington v. Wright, 9 Ga. 23.

[114] Prewitt v. Walker, 7 J. J. Marsh. 332.

Note.—We have now referred to the principal features of the trial of the rights of property under the common and statutory law, and do not consider it necessary or proper, in this work, to make any further reference to the statutory provisions in the several states. We content ourselves with citing the following decisions not cited in the text: Betton v. Willis, 1 Fla. 262; Roe v. Neal, Dudley, 168; Anthony v. Brooks, 5 Ga. 576; Mayor of Macon v. Trustees, 7 Ga. 204; Williams v. Martin, 7 Ga. 377; Colquitt v. Thomas, 8 Ga. 258; Lynch v. Pressley, 8 Ga. 327; Keith v. Whelchel, 9 Ga. 179; Huntington v. McLeod, 12 Ga. 212; McConnell v. Rhodes, 14 Ga. 313; Bethune v. Barker, 14 Ga. 694; Lynch v. Bond, 19 Ga. 314; Rogers v. Bates, 19 Ga. 545; Simmons v. Bennett, 20 Ga. 48; Scott v. Winship, 20 Ga. 429; Mize v. Ells, 22 Ga. 565; Hodges v. Holiday, 29 Ga. 696; Max v. Watkins, 30 Ga. 682; Benton v. Benson, 32 Ga. 354; Renneker v. McMichael, 33 Ga. 94; Pearce v. Swan, 1 Scam. 266; Craig v. Peake, 22 Ill. 185; Kendall v. Hall, 6 Blackf. 507; Hanna v. Steinberger. 6 Blackf. 520; Matlock v. Strange, 8 Ind. 57; Watson v. Gabby, 18 B. Mon. 658; Gleason v. Sheriff, 19 La. Ann. 143; Bach v. Verbois, 19 La. Ann. 163; Penrice v. Cocks, 1 How. (Miss.) 227; Walker v. Commissioners, 1 Smedes & M. 372; Thomas v. Estes, 2 Smedes & M. 439; Pritchard v. Myers, 3 Smedes & M. 42; Sevier v. Ross, 1 Freem. Ch. 519; Been v. Lindsey, 2 Smedes & M. 581; Kibble v. Butler, 14 Smedes & M. 207; Walker v. McDowell, 4 Smedes & M. 118, 43 Am. Dec. 476; Ellis v. Abercrombie, 10 Smedes & M. 474; Saffarans v. Terry, 12 Smedes & M. 690; Sears v. Gunter, 39 Miss. 338; Biddle v. Moore, 3 Pa. St. 161; Myers v. Prentzell, 33 Pa. St. 482; Warder v. Davis, 35 Pa. St. 74; Wolf v. Payne, 35 Pa. St. 97; King v.

Digitized by Google

§ 278. Bills of Interpleader to Compel Claimant to Try his Title.—We have now spoken of the two modes of procedure resorted to by officers for the purpose of protecting themselves when the title to property seized, or about to be seized, by them was in dispute. We have shown that the first method, that of applying to the court for an order enlarging the time for the return of the writ until indemnity should be given, was by far the more satisfactory of the two in its results. We have also shown that the other mode of procedure, that of referring the question to the determination of a jury, was far from satisfactory. Another method has, in a few cases, been referred to. In these cases it has been suggested that a sheriff, by filing in equity a bill of interpleader, could compel adverse claimants to litigate the title in a suit between themselves, instead of seeking redress against him.[115] It seems now, however, to be clearly established that this mode of procedure is not available. In the case of Shaw v. Coster,[116] Chancellor Walworth discussed this question as follows: "Frequent attempts have been made by sheriffs to sustain bills of interpleader, where the property levied on by them has been claimed by third persons adverse to the claim of the sheriff and the creditor under the execution. But I have not been able to find any case, in which the question has

Faber, 51 Pa. St. 387; Paxton v. Boyce, 1 Tex. 317; McQuinnay v. Hitchcock, 8 Tex. 33; Latham v. Selkirk, 11 Tex. 314; Chapman v. Allen, 15 Tex. 278; Lewis v. Taylor, 17 Tex. 57; Carey v. Tinsley, 22 Tex. 383; Anderson v. Anderson, 23 Tex. 639; Green v. Banks, 24 Tex. 508; McDuffie v. Greenway, 24 Tex. 625; Wheeler v. Wooton, 27 Tex. 257; Moore v. Auditor, 3 Hen. & M. 232; Miller v. Crews, 2 Leigh, 576; Lewis v. Adams, 6 Leigh, 320; Aylett v. Roane, 1 Gratt. 282; Davis v. Davis, 2 Gratt. 363.

[115] Cooper v. Chitty, 1 Burr. 20; Nash v. Smith, 6 Conn. 421.

[116] 8 Paige, 339, 35 Am. Dec. 690.

Digitized by Google

been deliberately examined, where a court of equity has decided in favor of such a proceeding. Indeed, it would be contrary to every principle of justice to permit a sheriff to seize property claimed by a third person under an execution against a judgment debtor, and then to compel such a third person to come into a court of equity and litigate the question of right to such property with the creditor in the execution, instead of trying the question at law against the sheriff himself as a wrongdoer. In Slingsby v. Boulton, 1 Ves. & B. 334, where the goods seized and sold by the sheriff were claimed by trustees under a settlement, who brought an action of trover therefor against him, Lord Eldon refused an injunction upon a bill of interpleader filed against the trustees and the creditor in the execution. He said the sheriff acted at his peril in selling the goods, and was concluded from stating a case of interpleader, in which the complainant always admitted a title in all of the defendants against himself; that a person could not file a bill of interpleader who was obliged to put his case upon this; that as to some of the defendants he was a wrongdoer." [117] It should be borne in mind that the proceeding of which we are now speaking, namely, a claim by a third person to property sought to be taken in execution, rests upon entirely different grounds from those involved in a contest between creditors of the defendant in execution, all claiming the proceeds of the sale or some part thereof. In such a case, as all claim un-

[117] Shaw v. Coster, 8 Paige, 339, 35 Am. Dec. 690; Dewey v. White, 65 N. C. 225; Rogers v. Weir, 34 N. Y. 469; Slingsby v. Boulton, 1 Ves. & B. 334; Quinn v. Green, 1 Ired. Eq. 229; Quinn v. Patton, 2 Ired. Eq. 48; Parker v. Barker, 42 N. H. 78, 77 Am. Dec. 789; Shaw v. Chester, 2 Edw. Ch. 405; Boston T. N. B. v. Skilling etc. L. Co., 182 Mass. 410; Morriston F. N. B. v. Binninger, 26 N. J. Eq. 345.

Digitized by Google

der the defendant, and none of them adversely to him, the sheriff or other officer having in his custody the proceeds of the sale, may compel them to interplead, and thus submit to a determination of their respective claims to the moneys in his hands.[118]

As by the decided weight of authority, the right to compel one claiming adversely to the defendant in execution to interplead cannot be sustained by the principles of equity jurisprudence, its support is entirely dependent upon certain statutes, the most prominent of which is St. 1 and 2, Wm. IV., chap. 58, §§ 6 and 7. This statute recites that difficulties have arisen in the execution of process against goods and chattels by reason of claims made thereto by persons who are not parties to the writ, in consequence of which the officers have been exposed to hazard and expense of actions against which it is reasonable to afford relief, and enacts that when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution, it shall be lawful for the court whence the process issued, upon application to the sheriff or other officer, made before or after the return of the process, as well as before or after any action brought against him, to call before them by rule of court, as well the party issuing such process as the party making such claim, and to exercise for the adjustment of claims and for the relief and protection of officers the powers contained in the statute, and to make such rules and decrees as shall appear to be just according to the circumstances of the case. The statute further declares that every rule or order shall have the force and effect of a judgment, and

[118] Lawson v. Jordan, 19 Ark. 297, 70 Am. Dec. 596; Fairbanks v. Belknap, 135 Mass. 179; Storrs v. Payne, 4 Hen. & M. 506; McDonald v. Allen, 37 Wis. 108, 19 Am. Rep. 754.

Digitized by Google

that writs of execution may issue thereon. Under this statute a sheriff was not entitled to move for relief until the claim to the property had actually been made by some one,[119] but, the claim being made, it was his duty, if he wished the benefit of the statute, to claim its protection promptly,[120] and he need not first demand indemnity, nor wait until an action was brought against him,[121] nor until after his levy has been made.[122] The practice appears to have been to obtain an interpleader summons, and to serve it on the claimant of the property. Where such a summons was obtained and served, but the claimant, being in possession, nevertheless, sold the property, the court refused to commit him for his contempt on his showing that the property was his, saying that the act complained of did not constitute any contempt of court, because it was lawful for the owner of goods to dispose of them, and that the real contempt was that of the "officer abusing the process of the court by seizing the goods of one person under a writ against another." [123]

In Pennsylvania a statute exists in substantial conformity to the English statute hereinbefore referred to. It provides that, whenever goods or chattels have been levied upon by the sheriff of any county under any execution or attachment, and he has been notified that such goods and chattels, or some part of them, belong to some person other than the defendant in the writ, the officer shall enter a rule in the court out of which the process issued on the supposed owner, to show cause

[119] Bentley v. Hook, 2 Dow. 339; Webster v. Delafield, 7 C. B. 187.
[120] Crump v. Day, 4 C. B. 760.
[121] Green v. Brown, 3 Dow. P. C. 337; Crosby v. Ebers, 1 H. & W. 216.
[122] Day v. Carr, 7 Exch. 883.
[123] Day v. Carr, 7 Exch. 883.

Digitized by Google

why an issue should not be framed to determine ownership of the goods and chattels, and that notice of the rule shall be given to the claimant and to the plaintiff and the defendant in execution and person or persons found in possession of the chattels. If the court shall make the rule absolute, the claimant shall give a bond with security in double the value of the goods, conditioned that he will at all times maintain his title thereto or pay the value thereof to the party entitled, and thereupon such goods and chattels are required to be delivered to the claimant. The bond so given inures to the benefit of the plaintiff in execution and of any other person who may be adjudged to have the right or title to the property in controversy, or any part thereof. An issue is then required to be framed between the contesting parties. The courts of common pleas are authorized to make general rules governing the proceedings. If the claimant fails to give bond, the court may direct a sale of the goods and chattels, and the payment of the proceeds thereof into court, to await the determination of the issue. If, upon the trial of the issuethe titleis found to be in theclaimant,he must pay the costs of the proceeding, including counsel fees, and, if he has received possession of the property, a verdict and judgment may be entered against him for the value thereof. The sheriff, if he complies with the provisions of the act, is freed from all liability to the claimant, the plaintiff, or defendant in execution to the person found in possession of the chattels, and every other person who had knowledge of the levy or seizure prior to the sale of the goods and chattels, or who had taken any step under the provisions of the statute.[124]

[124] Pepper & Lewis Digest, Supp. 1897, pp. 294, 295.

Digitized by Google

CHAPTER XVIII.

OF LEVIES UPON REAL ESTATE.

§ 279. Levy not to be made where personalty can be taken.
§ 280. How levy may be made.
§ 280a. What required to constitute a levy of real estate.
§ 280b. Statutory provisions respecting levies upon real estate.
§ 281. Describing the real estate levied on.
§ 282. The effect of the levy.

§ 279. Real Estate not to be Seized While There is Personalty.—By the common law, real estate was considered of far greater importance than personal property. Aside from its intrinsic value, it gave to its owner certain privileges, and seemed to create for him a certain amount of dignity not accorded to the holder of personal estate. In the earlier stages of the common law, various reasons, having their origin in the prevailing feudal system, prevented, or at least impeded, the free alienation of real property. But while these reasons have ceased with the system out of which they grew, the alienation of real property is still less favored than that of personalty. This is particularly the case with reference to involuntary transfers.[1] In the majority of the states real estate

[1] In Illinois the rule is reversed. Personal property cannot be taken until after the defendant has had an opportunity to turn out real estate. Tuttle v. Wilson, 24 Ill. 553; Pitst v. Magie, 24 Ill. 610. The statute, 5 George II, chap. 7, placed lands within the colonies on the same footing with respect to execution as personal property by enacting that after September 29, 1732, "the houses, lands, negroes, and other hereditaments and real estate situate and being within any of the said plantations belonging to any person indebted, shall be liable to, and charged with, all just debts, dues, and demands of what nature or kind soever, ... and shall be subject to the like

Digitized by Google

may be sold under execution. But the plaintiff cannot seize real or personal estate at his option. The law assumes that the interests of the defendant require that he be permitted to retain his realty in preference to his personal estate. Officers are, therefore, required first to levy upon personal estate, if it can be found.[2] Practically this requirement has been of little value to the judgment debtor. It seems to be sufficient to sustain a levy upon realty that the officer making it did not, at the time, know of any sufficient personal property belonging to defendant, though such defendant had not been seen and inquired of for the purpose of obtaining information upon this subject.[3] If the defendant has both real and personal property, but not enough of the latter to satisfy the writ, there is no objection to levying on the real estate at the same time or even before the levy is made on the personal property, if the latter is first advertised and sold.[4] The requirement of the law that personal estate be first levied upon

remedies and proceedings and process in any court of law or equity in any of said plantations respectively for seizing, extending, selling, or disposing of any of such houses, lands negroes, or other hereditaments or real estate toward the satisfaction of such debts, duties, and demands in like manner as personal estates in any of said plantations respectively, are seized, extended, sold or disposed of for the satisfaction of debts." 16 Eng. Stat. at Large, 273.

[2] Hassell v. Southern Bank, 2 Head, 381; Glauque's Rev. Stats. Ohio, 7th ed., § 5383; Bartholomew v. Hook, 23 Cal. 277; Sloan v. Stanly, 11 Ired. 627; Aldrich v. Wilcox, 10 R. I. 405; Robinson v. Burge, 71 Va. 526; Nelson v. Bronnenburg, 81 Ind. 193; Collins v. Ritchie, 31 Kan. 371; Jakobsen v. Wigen, 52 Minn. 6; Farrior v. Houston, 100 N. C. 369, 6 Am. St. Rep. 597.

[3] Collins v. Ritchie, 31 Kan. 371; Stancill v. Branch, 61 N. C. 306, 93 Am. Dec. 592.

[4] Sullenger v. Buck, 22 Kan. 28. In Driscoll v. Morris, 2 Tex. Civ. App. 603. it was said that the issuing of an alias execution to another county, to be levied on land there, while the judgment debtor owns personal property in the county wherein the judgment was rendered, which had not been levied upon, and which he had

Digitized by Google

is directory merely. The officer may refuse to comply with it. He may seize real estate unnecessarily. The defendant may, in that event, recover damages for the injury sustained, or he may prevent the consummation of the officer's improper mode of proceeding by procuring an order of court vacating the levy. If, however, no action is taken to vacate the levy, it cannot be treated as void. On the contrary, the levy and the sale based thereupon will be sustained from collateral assault.[5] A return, showing that the officer could find no goods of the defendant, justifies a levy on real estate.[6] Where no such showing is made, a sale of realty will not be confirmed.[7] The defendant may waive his right to have his personal property taken first. This he may do by requesting the officer to levy on real estate, or merely by pointing it out to the officer as proper property to be taken,[8] or by refusing to produce personal property when demanded.[9] Where there are two or more defendants, a levy may be

not been called to point out, was an irregularity, and the sale there involved was declared invalid, but it was infected with other gross irregularities, and hence it is not possible to state what the result would have been had the only irregularity been that of the issuing of execution and its levy on real estate while there was personal property subject thereto.

[5] Faris v. Banton, 6 J. J. Marsh. 235; Hayden v. Dunlap, 3 Bibb, 216; Beeler v. Bullitt, 3 J. J. Marsh. 280, 13 Am. Dec. 161; Jakobsen v. Wigen, 52 Minn. 6; Wheeling etc. Co. v. First N. B., 55 Oh. St. 233; McIntire v. Durhem, 7 Ired. L. 151, 45 Am. Dec. 512; Lawrence v. Grambling, 13 S. C. 120; Odle v. Frost, 59 Tex. 684.

[6] Treptow v. Buse, 10 Kan. 170; First N. B. of Deadwood v. Black Hills etc. Assn., 2 S. Dak. 145.

[7] Koehler v. Ball, 2 Kan. 160, 83 Am. Dec. 451.

[8] Hopkins v. Burch, 3 Ga. 222; Spencer v. Champion, 18 Conn. 11; Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; First N. B. of Deadwood v. Black Hills etc. Assn., 2 S. Dak. 145.

[9] Graves v. Merwin, 19 Conn. 96; Sloan v. Stanly, 11 Ired. 627; Allen v. Gleason, 4 Day, 376.

Digitized by Google

made on the realty of either when he has no personal estate subject to the writ. It is not necessary that the personal estate of all should be exhausted before the real estate of any can be levied upon.[10] If the personal estate of the defendant is so encumbered that it cannot be expected to realize anything at a forced sale, the officer may at once levy on real estate.[11]

§ 280. Levy on Real Estate, when Unnecessary.— Judges frequently speak of a levy, and sometimes of a seizure, of real estate under execution. Notwithstanding this fact, it may well be doubted whether a levy is essential to a sale, and if essential, whether any one can confidently state the acts indispensable to its legal existence, except where those acts have been definitely prescribed by statute. Certainly there are states in which no formal levy on real estate is required.[12] The only object of a levy is to create a lien upon the land, or in other words, to subject the lands to the payment of the plaintiff's debt. If this has already been done, a levy is supererogatory. Even if it has not been done, the only result, in our judgment, of the officer's failure to levy upon real property is, that when it is sold under execution, the sale is not supported by any lien, and hence, when followed by a conveyance by the officer, such conveyance can have no greater effect than a conveyance by quitclaim by the defendant in execu-

[10] Faris v. Banton, 6 J. J. Marsh. 235; Crowder v. Sims, 7 Humph. 257; Drake v. Murphy, 42 Ind. 82.

[11] Detrick v. State Bank, 6 Ind. 439; Williams v. Reynolds, 7 Ind. 622.

[12] Bidwell v. Coleman, 11 Minn. 78; Lockwood v. Bigelow, 11 Minn. 113; Folsom v. Carli, 5 Minn. 333, 80 Am. Dec. 429; Doe v. Hazen, 3 Allen (N. B.), 87; Knox v. Randall, 21 Minn. 479; Van Gelder v. Van Gelder, 26 Hun, 356; McEntire v. Durham, 7 Ired. 151, 45 Am. Dec. 512. See, also, Hamblen v. Hamblen, 33 Miss. 455,

Digitized by Google

tion at the moment of the sale. That effect should, however, be conceded whether the sale was preceded by any levy or by any judgment or execution lien.[13] It is true that in several instances judges have spoken of the actual seizure of, or levy upon, land as essential to the transfer of the title thereof under execution sale,[14] but the question was not involved except in one case, and in that it did not receive any serious consideration.

If the sale has been ordered by a court of chancery, in a suit in which all the parties in interest were before the court, there is no need of any levy, for the right to sell the land has attached as a consequence of the proceedings in the suit. In truth, the suit may have been for the express purpose of enforcing a pre-existing lien. If so, the title to be acquired by the sale will relate back to the inception of that lien, and cannot possibly be aided by any levy made after the entry of the decree. Hence, under a decree foreclosing a mortgage, no levy need be made on the mortgaged premises. "No formal levy of a certified copy of a judgment of sale in a foreclosure suit is necessary, because the judgment itself designates the particular property to be sold, and no other could be levied on under the copy of the judgment, at least till that designated had been sold, nor without a provision in the judgment authorizing it." [15] In every case in which from the entry of the

69 Am. Dec. 358. maintaining that a levy is necessary, but that it will be presumed from the advertisement of the property for sale and its sale pursuant to the advertisement.

[13] Frink v. Roe, 70 Cal. 296.

[14] Hughes v. Watt, 26 Ark. 228; Addison v. Crow, 5 Dana, 271; Waters v. Duvall, 11 G. & J. 37, 33 Am. Dec. 693; Elliott v. Knott, 14 Md. 121, 74 Am. Dec. 519; Dorsey v. Dorsey, 28 Md. 388; Jarboe v. Hall, 37 Md. 345; Wright v. Orrell, 19 Md. 151.

[15] Ewing v. Hatfield, 17 Ind. 513; Bank of Brit. Col. v. Page, 7 Or. 454; Lenhardt v. Jennings, 119 Cal. 192.

Digitized by Google

judgment it follows that specific real property may be sold for its satisfaction, and in which the writ issued is either in express terms or in legal effect a special execution authorizing a sale of specific real property either because the judgment expressly directs such sale, or because, by reason of a pre-existing attachment, such property has been impressed with a lien for the satisfaction of a judgment, there can be no necessity for any purpose of any levy on such property under the writ of execution.[16] Though the judgment does not direct the sale of any specific property, it may, under the statute, constitute a lien on the real property of the defendant. If so, a levy can add nothing to the efficiency of the judgment lien, and is entirely unnecessary, if the sale is to be consummated before the expiration of the judgment lien.[17]

§ 280 a. What Required to Constitute a Levy on Real Estate.—The statutes in many of the states have not prescribed the acts requisite to a levy on real estate; and where this is the case, it is difficult to determine of what a levy on real estate consists. In Missouri, the judges confess that the law is silent as to what acts shall be sufficient to constitute a levy on real estate.[18] The object of a levy is, by some overt act, to dedicate the property subjected thereto, whether real or personal, to the satisfaction of the writ. As to personalty, this result is attained by a seizure, actual or constructive. In Louisiana, an officer levying a writ on real

[16] Lenhardt v. Jennings, 119 Cal. 192; Smith v. Burnes, 8 Kan. 197; Burkett v. Clark, 46 Neb. 466.

[17] Surratt v. Crawford, 87 N. C. 372; Van Gelder v. Van Gelder, 26 Hun, 356; Judge v. Houston, 12 Ired. 108; Wood v. Colvin, 5 Hill, 228; Farrior v. Houston, 100 N. C. 369, 6 Am. St. Rep. 597.

[18] Duncan v. Matney, 29 Mo. 368, 77 Am. Dec. 575.

Digitized by Google

estate must also seize and hold possession of it.[19] But in all other portions of the United States this rule does not prevail. The officer does not disturb the defendant's possession, and, as a general rule, need never go upon the property on which he seeks to levy.[20] "It seems to be the general rule, in the states of this Union, that a levy upon or seizure of real property for the purposes of sale may be legally made without going upon the premises, by simply indorsing a description of the premises upon the writ, and stating that they are levied upon for the purposes thereof."[21] "No entry by an officer on real estate is necessary to constitute a levy. The officer may remain in his office and not even go within view of the land; he need not seize upon any twig, turf, or other part thereof as symbolical of the whole. His indorsement upon the execution of a levy will constitute one to all intents and purposes. From the time that a valid levy is made, the land is in legal sense 'seized in execution'—that is, rendered liable for its satisfaction. Nowhere in the statutes is the officer directed to make any actual seizure, which, it would seem, could only be done by taking possession of the land and ousting the judgment debtor. It would be contrary to all previous notions concerning the duties of such officers to hold that, prior to sale or appraisement, and upon the mere receipt of the writ, it becomes their duty to enter upon the debtor's land and

[19] Corse v. Stafford, 24 La. Ann. 263.

[20] Fenno v. Coulter, 14 Ark. 38; Hammatt v. Bassett, 2 Pick. 564; Fitch v. Tyler, 34 Me. 463; Burkhardt v. McLellan, 15 Abb. Pr. 243; Bond v. Bond, 2 Pick. 382; Hall v. Crocker, 3 Met. 245; Catlin v. Jackson, 8 Johns. 546; Leland v. Wilson, 34 Tex. 79; Herr v. Broadwell, 5 Colo. App. 467; Jones v. Allen, 88 Ky. 381; Busey v. Tuck, 47 Md. 171; Lynch v. Earle, 18 R. I. 531; Martin v. Bowie, 37 S. C. 102; Sanger v. Trammell, 66 Tex. 361.

[21] U. S. v. Hess, 5 Saw. C. C. 533.

Digitized by Google

take possession."[22] In Kentucky, it is said that the question whether a levy has been made should not be allowed to rest solely in the breast of the officer; that he must accompany the levy by some act of notoriety, such as by going upon the land, or by seeing the defendant, or his agent, and informing him of the levy; and that he must also make an entry on his writ.[23] Where there are no statutory provisions governing the officer, a mere entry on the writ, or an advertisement of sale, or making a memorandum descriptive of the premises, intending it for the purpose of levy, is generally regarded as a sufficient levy.[24] The indorsement of a levy on the writ is frequently spoken of in the decisions, and language is sometimes used indicating that it is essential to a valid levy.[25] Where the statute does not point out any specific act to be done to perfect a levy on realty, nor for the filing or recording of any written evidence of the levy in any public office, we can understand that the courts must incline toward insisting upon some endorsement of the writ, or, at least, some entry in writing somewhere, to show what the officer actually did. Otherwise whether a levy had been made or not would seem to rest in his breast or knowledge only. Nevertheless, unless made so by statute, the endorsement cannot properly be deemed an essential part of the levy, or, indeed, any part of it whatsoever, but merely a method of making and

[22] Morgan v. Kinney, 38 Ohio St. 610; Cavanaugh v. Petersen, 47 Tex. 197.

[23] McBurnie v. Overstreet, 8 B. Mon. 300.

[24] Isam v. Hooks, 46 Ga. 309; Hamblen v. Hamblen, 33 Miss. 455, 69 Am. Dec. 358; Rodgers v. Bonner, 45 N. Y. 379.

[25] Ansley v. Wilson, 50 Ga. 418; Douglas v. Whiting, 28 Ill. 362; Vallandingham v. Worthington, 85 Ky. 83; Hancock v. Henderson, 45 Tex. 479; Riordan v. Britton, 69 Tex. 198, 5 Am. St. Rep. 37.

Digitized by Google

preserving evidence thereof.[26] In Louisiana, though a seizure of real estate is ordinarily necessary to consummate a levy upon it, this rule does not prevail when the property is leased and the judgment debtor has no right of possession. "The ceremony of going on the property and immediately retiring therefrom would be too idle and objectless to suppose that it was within the contemplation of the law. In such a case, due notice of the seizure to the owner and judgment debtor is all that the law requires." [27]

In Vermont, it was, at an early day, determined that the officer must levy on the land, instead of levying on all the defendant's right, title, and interest therein.[28] But as a levy can, in no event, affect an interest to which the defendant has no valid claim, there can be no reasonable objection to a levy on all the defendant's right, title, and interest in land. Such a levy is in legal effect a levy upon the land.[29] Ordinarily it cannot be necessary, or even advisable, for the levying officer to undertake to determine the nature or extent of the defendant's interest. Hence, the safer practice must be to levy upon all his title and interest, whatsoever it may be, leaving intending purchasers to satisfy themselves upon the subject before making their bids at the execution

[26] Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441; Herr v. Broadwell, 5 Colo. App. 467; Demint v. Thompson, 80 Ky. 255; Vroman v. Thompson, 51 Mich. 452; Hamblen v. Hamblen, 33 Miss. 455, 69 Am. Dec. 358; Lynch v. Earle, 18 R. I. 531; Lea v. Maxwell, 1 Head, 365; McMillan v. Gaylor (Tenn. Ch.), 35 S. W. 453; Hammel v. Queen's I. Co., 54 Wis. 72, 41 Am. Rep. 1.

[27] Pipkin v. Sheriff, 36 La. Ann. 782.

[28] Arms v. Burt, 1 Vt. 310, 18 Am. Dec. 680; Paine v. Webster, 1 Vt. 131.

[29] Brown v. Smith, 7 B. Mon. 361; Balch v. Zentmeyer, 11 Gill & J. 267; Vilas v. Reynolds, 6 Wis. 214; Swan v. Parker, 7 Yerg. 490.

Digitized by Google

sale.[30] If, however, the land levied upon, instead of being sold, is to be set off to the plaintiff in satisfaction of his debt, or, though sold, it must first be appraised, and no bid is authorized to be received unless for a designated percentage of its appraised value, it may become necessary to ascertain the interest to be levied on and sold, and while the defendant has a conceded interest in fee, a levy upon some less interest may not be sufficient to support an execution sale or a setting apart of the property to the plaintiff in satisfaction of his judgment.[31] There is no objection to a levy which purports to include a greater estate or interest than the defendant has,[32] or which embraces a tract of land in which he has no interest and to which he makes no claim.[33] It has been said that an officer cannot sell, or a purchaser acquire, any greater estate than was embraced in the levy.[34] This we do not concede, for we have already stated our opinion to be, that a levy on realty is not essential to a sale, and to be desirable only when it is sought to create some lien which shall antedate the time of the sale, and hence, we believe that if a sale purports to be of the whole of the defendant's interest, such interest will be divested irrespective of the extent of the levy. If an officer levies upon and sells a less interest in real estate than that actually owned by the defendant and subject to execution against him, he doubtless is entitled to quash the levy and sale upon showing any prejudice to him in proceed-

[30] Humphrey v. Wade, 84 Ky. 391; Smith v. Crosby, 85 Tex. 15, 40 Am. St. Rep. 818.

[31] De Jarnette v. Verner, 40 Kan. 224; Brown v. Clifford, 38 Me. 210.

[32] Parler v. Johnson, 81 Ga. 254; Coleman v. Simrall, 91 Ky. 188.

[33] Smith v. Crosby, 85 Tex. 15, 40 Am. St. Rep. 818.

[34] Parler v. Johnson, 81 Ga. 254; Rogers v. Bradford, 56 Tex. 630.

Digitized by Google

ing against the lesser interest. The instances in which an error of this kind has been committed are very rare, and, hence, it is not yet settled whether the levy is valid or not. On the one hand it is said that such a levy and sale are absolutely void,[35] and on the other, that they are not subject to collateral attack.[36] In Michigan, it is not indispensable that the levy be indorsed on the writ, if the officer executes, and causes to be recorded in the office of the register of deeds, a notice of levy in the form prescribed by the statute. "It is not admitted that the visible evidence required can only exist in the form of an indorsement on the writ. The statute does not require it, and there is nothing in the nature of the thing demanding it. The object is to have some outward and permanent manifestation of the fact—something which is durable, intelligible, and public, in the nature of a record, to which all may resort who are entitled to information, and desire it. The necessity is for evidence which is plain and acceptable, and this is well afforded by the recorded notice prescribed by the statute."[37] While it is proper that the indorsement of the levy should be signed by the officer, the omission of his signature is not fatal to the levy.[38] In California, it is not necessary that the sheriff's return state the acts which he did in levying a writ. In a case in which this question was involved, the court said: "Our statute prescribes the manner in which real estate may be attached, but contains no express provisions requiring that all the acts necessary to a valid levy shall be set out in the re-

[35] McLaughlin v. Shields, 12 Pa. St. 283.
[36] O'Conner v. Youngblood, 16 Ala. 718.
[37] Vroman v. Thompson, 51 Mich. 456.
[38] Sharp v. Kennedy, 50 Ga. 208.

Digitized by Google

turn; and we think the rule contended for was not contemplated by the legislature, that it is not warranted by the language of the statute, or supported by authority. The general rule with regard to the execution of mesne process is, that all presumptions are in favor of the regularity of the acts of the officer, and that a return which simply states that the process was executed is sufficient, prima facie, to show a due and proper execution." [39]

§ 280 b. Statutory Provisions Respecting Levies upon Real Estate have been enacted in many of the states, for the purpose of designating with greater certainty the acts essential to a valid levy, and of compelling the preservation of authentic memorials of those acts, whereby intending purchasers and encumbrancers may be warned of the lien thereby imposed. The statutes respecting the levy of attachments will be here referred to, because the acts therein prescribed are generally the same as are required for levies under execution. When, in Alabama, an execution is levied on real property, a full description thereof, with the date of the levy, must be endorsed on, or appended to, the execution, and personal notice must be given to the defendant, or a notice in writing left at his residence, if resident within the county; if not a resident in the county, then by putting up a written notice at the courthouse door, and the manner of giving the notice must be stated in the return.[40] In Arizona and Texas, "in order to make a levy on real estate, it shall not be necessary for the officer to go upon the ground, but it shall

[39] Ritter v. Scannell, 11 Cal. 248, 70 Am. Dec. 775.
[40] Code Ala., 1886, § 2904.

Digitized by Google

be sufficient for him to endorse such levy on the writ." If the writ is of attachment, the officer must file a copy of the writ, together with a description of the property attached, with the county recorder.[41] In Arkansas, Kansas, and Kentucky, an order of attachment is executed "upon real property, by leaving with the occupant thereof, or, if there is no occupant, in a conspicuous place thereon, a copy of the order."[42] In California, Idaho, Montana, and Utah, real property must be attached in the following manner: "Real property standing upon the records of the county in the name of the defendant, by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached." When the real estate is held by some person for the benefit of the defendant, or standing on the records in the name of a person other than the defendant, it is attached by giving to such other person, or his agent, a copy of the writ, notice, and description, and by complying with all the other formalities requisite when the property stands in defendant's name on the records.[43] In Colorado, "real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the

[41] Rev. St. Arizona, 1887, §§ 55, 1905; Sayles Tex. Civ. St., 1897, § 2348.

[42] Sandel & Hill's St. Ark., 1894, p. 285, § 336; Gen. St. Kan., 1897, p. 147, § 198; Carroll's Ky. Code, 1895, § 203.

[43] C. C. P. of Cal., § 542; Rev. St. Idaho, 1887, § 4307; C. C. P. Mont., § 839; Rev. St. Utah, 1898, § 3073.

Digitized by Google

county." If the property stands in the name of some other person for the benefit of the defendant, the sheriff, in addition to filing a copy of the writ and description with the recorder, must do the other acts required in like cases by the code of California.[44] In Connecticut, "real estate shall be attached by the officer's lodging with the town clerk of the town in which it is situated a certificate that he has made such attachment, which shall be indorsed by the town clerk with a note of the precise time of its reception, and kept on file, open to inspection, in the office of said town clerk."[45] In Georgia, "the officer making the levy shall also enter the same on the process by virtue of which such levy is made, and in such entry shall plainly describe the property levied upon and the amount of the interest of the defendant therein." If the levy is on real property, the officer must, within five days after making it, "leave a written notice of such levy with the tenant in possession of the land, if any, or with the defendant, if in the county, or transmit such notice by mail to the defendant."[46] In Illinois, "when a writ of attachment is levied upon any real estate, in any case, it shall be the duty of the officer making the levy to file a certificate of such fact with the recorder of the county where the land is situated; and from and after the filing of the same, such levy shall take effect, as to creditors and bona fide purchasers without notice, and not before."[47] Real property may be attached in Iowa, and the levy shall be a lien thereon, from the time of the entry made and signed by the officer making the same upon the encum-

[44] C. C. P. of Colo., § 104.
[45] Gen. St. Conn., 1888, § 914.
[46] Code of Ga., 1895, §§ 5421, 5426.
[47] Starr & Curtis' Ann. St. Ill., 1896, p. 972, § 117.

Digitized by Google

brance book in the office of the clerk of the county where the land is situate, showing the levy, the date thereof, the name of the county from which the attachment issued, the title of the action, and a description of the land levied upon. In case of a levy upon any equitable interest in real estate, such entry shall show, in addition to the foregoing matters, the name of the person holding the legal title and the owner of the alleged equitable interest, where known.[48] With respect to executions, the only statutory direction for their levy is that "if executed, an exact description of the property at length, with the date of the levy, shall be embraced or appended to the execution."[49] In Maine, an officer levying an attachment must, "within five days thereafter, file in the office of the register of deeds of the county or district in which some part of the estate is situated, an attested copy of so much of his return on the writ as relates to the attachment, with the value of the defendant's property, which he is thereby commanded to attach, the names of the parties, the date of the writ, and the court to which it is returnable." A like filing is necessary when a levy is made on execution, and the return filed must also show the date of the writ, "the amount of the debt, and costs named therein, and the court by which it was issued."[50] In Massachusetts, "in attaching real estate, or a right or interest in land, the officer need not enter upon the land, or be within view of it. In attaching leasehold estates, the officer shall state in his return, in general terms, the leasehold property attached."[51] To make an attachment of real

[48] Code Ia., 1897, § 3899.
[49] Ib., § 3968.
[50] Rev. Stats. Me., 1884, c. 81, § 59.
[51] Pub. Stats. Mass., 1882, c. 161, § 61.

Digitized by Google

estate valid as against subsequent bona fide purchasers or attaching creditors, the original writ, or a certified copy thereof, and so much of the officer's return as relates to the attachment, must be deposited in the office of the register of deeds, who must note on such writ or copy the day, hour, and minute when it was received.[52] In Michigan, the officer must make an inventory of the property attached, and serve a certified copy of the writ and inventory on the defendant. He need not view or enter upon the land. The real estate is bound "from the time when a certified copy of the attachment, with a description of the real estate attached, shall be deposited in the office of the register of deeds."[53] By the statutes of Minnesota, "real estate shall be attached by the officer leaving a certified copy of the writ, and of his return of such attachment thereon, at the office of the register of deeds of the county in which such real estate is situated, or, if there is no register of deeds, with the clerk of the district court of the county, and serving a copy of the same upon the defendant in the action, if he can be found in the county, without any other act or ceremony."[54]

"In case of a levy on real estate," in Mississippi, "the officer shall go to the house or land of the defendant, or to the person or house of the person in whose possession the same may be, and then and there shall declare that he attaches the same, at the suit of the plaintiff, in the writ named. But in the event the land is wild, uncultivated, or unoccupied, a return upon the writ by the proper officer that he has attached the land, giving a description thereof by numbers, metes, and

[52] Id., §§ 62-64.
[53] Howell's Ann. Stats. Mich., 1883, §§ 7991, 7993.
[54] Stat. Minn., 1894, § 5302.

Digitized by Google

bounds, or otherwise, shall be a sufficient levy, without going on the land." [55] In Missouri, "when lands and tenements are to be attached, the officer shall briefly describe the same in his return, stating the quantity and situation, and declare that he has attached all the right, title, and interest of the defendant in the same; and shall also file in the recorder's office of the county where the real estate is situated an abstract of the attachment, showing the names of the parties to the suit, and the amount of the debt, the date of the levy, and a description of the real estate levied on." [56] An order of attachment is executed in Nebraska and Ohio by the officer's going to the place where the property may be found, and in the presence of two residents of the county declaring that he attaches the property. "Where the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order." [57] In Nevada, "real property shall be attached by leaving a copy of the writ with the occupant thereof, or if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county." [58] "Real estate may be attached on any writ of mesne process," in New Hampshire, "by the officer leaving an attested copy thereof, and of his return of such attachment thereon, at the dwelling-house of the town clerk of the town in which such real estate is situate, or, if there is no town clerk, with the

[55] Thompson, Dillard & Campbell's Ann. Code Miss., 1892, § 3464.
[56] Rev. St. Mo., 1899, p. 222, § 543.
[57] Comp. St. Neb. 1897, § 5769; Gilauque's Rev. St. Oh., 1896, § 5528.
[58] Gen. Stats. Nev., 1885, c. 4, § 3150.

Digitized by Google

clerk of the supreme court of the county."[59] In New Mexico, "when lands or tenements are to be attached, the officer shall briefly describe the same in his return, and state that he attached all the right, title, and interest of the defendant to the same, and shall, moreover, give notice to the actual tenants, if any there be."[60] "A levy under a warrant of attachment," in New York, must be made, "upon real property, by filing with the clerk of the county where it is situated a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding his office address, and must be recorded and indexed by the clerk in the same book, in like manner and with like effect as a notice of the pendency of an action."[61] In Oregon, "real property shall be attached by leaving with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the sheriff." "The sheriff must also make a certificate containing the title of the cause, the names of the parties, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff, and the date thereof. Within ten days of the date of the attachment, the sheriff shall deliver such certificate to the county clerk of the county in which the real property is situated, who shall file the same in his office, and record it in a book kept for that purpose. When such certificate is so filed for record, the lien in favor of the plaintiff shall attach to the real

[59] Gen. Laws N. H., 1878, c. 224, § 3.
[60] Comp. Laws N. M., 1897, § 2698.
[61] Code Civ. Proc. of N. Y., 1895, § 649.

Digitized by Google

property described in the certificate from the date of the attachment, but if filed afterward, it shall only attach, as against third persons, from the date of subsequent filing."[62] In Pennsylvania, "if the attachment be levied on houses, other buildings, or lands, it shall be the duty of the sheriff to leave a copy of the writ with the tenant or other person in actual possession holding under the defendant in the attachment, and to summon him as garnishee. If there be no person in actual possession, as aforesaid, the sheriff shall publish a copy of the writ for six weeks in one newspaper printed in the county, if there be one, otherwise in one newspaper published nearest to the land attached; and such writ shall also be published in one or more newspapers in the city of Philadelphia, or elsewhere, as the court, if in session, or a judge thereof in vacation, at the time of issuing the same, having reference to the supposed place of residence of the defendant, shall direct." It is also the duty of the sheriff to file in the office of the prothonotary of the court a description of the property attached, within five days after making the attachment.[63] In Rhode Island, real estate is attached by "leaving an attested copy of the writ, with the officer's doings thereon, with the town clerk of the town in which such real estate is situated, unless there be a recorder of deeds of such town, in which case he shall leave a copy with such recorder of deeds, and the officer must also leave an attested copy of the writ with a general reference thereon to the real estate attached thereby, together with a statement of the date and time of day of such attachment, with the defendant personally, or with some person at his last and usual place of abode,

[62] Hill's Ann. Laws. Or., 1892, pp. 272, 274, §§ 149, 150.
[63] Brightly's Purdon's Digest of Pennsylvania.

Digitized by Google

if any he have, within the precinct of the officer, or, if he have none, then the officer shall send such copy by mail to such defendant, if his address be known."[64] In South Carolina, "when real estate is attached, a true and attested copy of such attachment, together with a description of the real estate attached, shall be, by the officer serving the same, delivered to the party whose real estate is attached, or left at his last and usual place of abode; and the officer making such service shall also leave a true and attested copy of such attachment, together with a description of the real estate so attached, in the office where, by law, a deed of such estate is required to be recorded."[65] In Virginia and West Virginia real estate is attached by "being mentioned and described by indorsement on such attachment";[66] while in Washington it is attached "by filing a copy of the writ, together with a description of the property attached, with the county auditor of the county in which such real estate is situated."[67] "To attach real estate, or any right or interest therein," in Wisconsin, "it shall not be necessary for the officer to enter upon or be in view of the land. But he shall file in the office of the register of deeds a copy of the writ of attachment, with his certificate indorsed or affixed, that by virtue of the original writ, of which such copy is a true copy, he has attached such real estate, or all the interest of the defendant therein, describing the same with convenient certainty as the property of a defendant, naming him in such writ."[68] In Wyoming

[64] Gen. Laws R. I., 1896, p. 876, § 10.

[65] Code C. P. of S. C., § 253.

[66] Code W. Va., 1891, p. 744, § 5.

[67] Ballinger's Codes & St. Wash., 1897, § 5362; Front St. etc. Co. v. Drake, 65 Fed. Rep. 539.

[68] Sanborn & Berryman's St. Wis., 1889, § 2737.

Digitized by Google

property is attached by leaving with the occupant of the property, or, if there is no occupant, in a conspicuous place thereon, a copy of the order of attachment.[69]

Some of these statutes, it will be observed, direct the doing of certain acts after the levy of the writ, such as filing a certificate or notice with some designated public officer. Under them, it seems obvious that the levy is regarded as already consummated, and the object of the filing is merely to give notice to strangers to the writ. As between such strangers and the purchaser of the property at execution sale, we should expect that the stranger, if he had become, after the levy and without actual notice thereof, a bona fide purchaser of the property for a valuable consideration, would be entitled to hold it. In Georgia, however, such does not appear to be the rule, unless the purchaser had actual notice of the omission of the officer to perform his duty.[70] This construction of the statute is, in our judgment, not permissible, where its language indicates that the notice to be given, or any act to be done, constitutes a part of the levy itself. The decisions interpreting the various statutes designating the acts to be done in making a levy on real property are infrequent. Where the officer is required to make an entry of his levy on the process under which it is made, no doubt the entry may be written for him, at his request, by another person; and if unable to write, the officer may attest the entry with his mark.[71] So far as the decisions have gone, they indicate that the statutes will be rather strictly construed, and that any substantial departure from their

[69] Rev. St. Wyo., 1887, § 2876.
[70] Solomon v. Peters, 37 Ga. 251.
[71] Cox v. Montford, 66 Ga. 62.

Digitized by Google

requirements is not consistent with a valid levy.[72] Thus, where there were two or more defendants, a levy upon lands as the property of one of them, without stating which one, was adjudged invalid.[73] In California, all the acts specified by statute must be performed before the attachment lien becomes operative, and their performance must be in the order in which they are enumerated in the statute.[74] If the sheriff is required to post a copy of the attachment on the premises, his return that he posted a notice does not show the creation of any attachment lien.[75] In his return it is not sufficient for the officer to state that he has levied his writ upon designated real property, but he must disclose what he did, that the court may therefrom be enabled to determine whether he made a levy or not.[76] The failure to index a notice of attachment entered in the incumbrance book does not, in Iowa, invalidate the levy, though the statute requires an index of such book to be kept.[77] It is, however, essential in that state to notify the defendant and to make a return of the writ, and, if a mortgage is executed and recorded before such return is completed by the signing thereof, the lien of the mortgage has precedence over that of the attachment.[78] In Oregon, where the return fails to show that the defendant occupies the land attached, or that a

[72] Graham v. Reno, 5 Colo. App. 330; Tomlinson v. Stiles, 28 N. J. L. 261; Hall v. Stevenson, 19 Or. 153, 20 Am. St. Rep. 803; Robertson v. Hoge, 83 Va. 124; Mickey v. Stratton, 5 Sawy. 475.

[73] Anderson v. Lee, 53 Ga. 189; Overby v. Hart, 68 Ga. 493.

[74] Main v. Tappener, 43 Cal. 206; Wheaton v. Neville, 19 Cal. 42; Watt v. Wright, 66 Cal. 202; Schwartz v. Cowell, 71 Cal. 306.

[75] Sharp v. Baird, 43 Cal. 577.

[76] Brusie v. Gates, 80 Cal. 467; Rudolph v. Saunders, 111 Cal. 235; Hall v. Stevenson, 19 Or. 153, 20 Am. St. Rep. 803; Robertson v. Hoge, 83 Va. 124.

[77] Blodgett v. Huiscamp, 64 Ia. 548.

[78] First N. B. v. Jasper C. B., 71 Ia. 486.

Digitized by Google

copy of the writ was delivered to the occupant, or that there was no occupant, and that the writ was posted on the premises, it is fatally defective,[79] and if two or more parcels of land are attached, the return must show, with respect to each, the doing of the acts essential to a valid attachment.[80] In Virginia, the return must show that the property was levied upon as the property of the defendant,[81] but in Illinois a notice of this character is not fatal to the levy, at least when collaterally assailed.[82] In Kansas, returns of officers showing the levies of writs upon real property are not so strictly construed as elsewhere. Where such a return states that the officer attached real property, describing it, and that he took possession thereof and left a true copy of the order of attachment, but fails to show in so many words either that such copy was left with the occupant, or that there was no occupant and that it was posted in a conspicuous place on the property, it will be presumed that the officer did his duty, and that the levy was properly made.[83]

§ 281. Of the Description of Real Estate Levied upon. The officer, by his entry on or his return to his writ, usually gives a description of the property upon which he has levied. Subsequently the sufficiency of this description may be controverted for the purpose, if possible, of avoiding the levy and sale. The description indorsed on the writ is very frequently substantially identical with that which is to be found in the notice of the sale and in the sheriff's deed. In such a case, the

[79] Hall v. Stevenson, 19 Or. 153, 20 Am. St. Rep. 803.
[80] Hall v. Stevenson, 19 Or. 153, 20 Am. St. Rep. 803.
[81] Robertson v. Hoge, 83 Va. 124.
[82] Hogue v. Corbit, 156 Ill. 540, 47 Am. St. Rep. 232.
[83] Wilkins v. Tourtellott, 42 Kan. 177; 28 Kan. 825, 29 Kan. 513.

Digitized by Google

true question to be determined is not whether the sale is void by reason of an imperfect levy, but whether it is void by reason of an insufficient levy, notice, and deed. There are very strong reasons for exacting a perfect description in the notice of sale and deed, which do not apply with equal force to the indorsement of the levy on the writ. Thus the levy consists of some act or acts which the officer is required to perform. These acts may have been performed with respect to a particular tract of land, and the fact of their performance may be well known to all the parties in interest, and be susceptible of proof. If so, an actual levy has, we think, been made. The tract may be imperfectly described on the writ, or it may not be described there at all. If so, the only inconvenience arising from this official omission or imperfection is that the act, instead of being attested by the official entry, must be established by other methods of proof. Beyond this no injury can result to the defendant, nor to any other person. But when the land is advertised for sale, the result of an insufficient description is very different. The object of the advertisement is to give notoriety to the proposed sale, so that all persons may understand what it is that is to be sold. No one will bid unless he can know for what he is bidding. The rights of the defendant must necessarily be sacrificed, unless the thing to be sold is made certain. People may refuse to bid, or, after successful bidding, may claim more than the officer intended to sell, or may have their purchase restricted to less than was intended to be sold. So the deed, being the conveyance of the defendant's title, and the final evidence of the extent of the purchaser's acquisition, ought to be specific and free from ambiguity. Hence, we think those authorities are based on sound principles, which hold that an

Digitized by Google

imperfect description in the indorsement of the levy becomes immaterial when it is succeeded by a notice of sale and officer's deed, in both of which the property sold is clearly and unmistakably designated; and that the indorsement, if material, may be amended so as to conform to the true state of the facts; or in other words, so as to describe the land actually levied upon.[84] In one case it was claimed that there must always be some description;[85] in others, that the description made by the officer must always be regarded as the best evidence, and must be produced, unless lost or destroyed;[86] while in others, the general principle is asserted that the levy and its accompanying acts may always be shown by parol evidence.[87]

The sufficiency of the description of real property levied upon can be material only in those courts wherein it is held that a levy is indispensable to a valid sale, or where, between the attempted levy and the sale, some conveyance or incumbrance has been made or suffered by the defendant, which is claimed to have precedence over the title of the purchaser at the execution sale, because his title is not supported by a valid levy. In those states in which some evidence of the levy is required to be recorded in a public office, for the purpose

[84] Parker v. Swan, 1 Humph. 80, 34 Am. Dec. 619; Vance v. McNairy, 3 Yerg. 177, 24 Am. Dec. 553; Gibbs v. Thompson, 7 Hump. 181; Coffee v. Silvan, 15 Tex. 354, 65 Am. Dec. 169; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Sartor v. McJunkin, 8 Rich. 451; Sumner v. Moore, 2 McLean, 59; Donaldson v. Bank of Danville, 20 Pa. St. 245; Hopping v. Burnam, 2 G. Greene, 39; Matthews v. Thompson, 3 Ohio, 272; Riddle v. Bush, 27 Tex. 675. The power to amend is denied in Phillipse v. Higdon, Busb. 380.

[85] McLelland v. Slingluff, 7 Watts & S. 134.

[86] Farmers' Bank v. Fordyce, 1 Pa. St. 454; Gaither v. Martin, 3 Md. 146.

[87] McBurnie v. Overstreet, 8 B. Mon. 303; Byer v. Etnyre, 2 Gill, 150, 41 Am. Dec. 410.

Digitized by Google

of charging third persons with notice, it is manifest that the description of the property, to have that effect, must be as complete and specific as would be required to accomplish the same purpose in a conveyance. If the land is not levied upon, and there is a sale by a description which is fatally defective according to the rules ordinarily applicable to conveyances, it cannot be perfected by the sheriff's deed, for that officer has no authority to convey property which he did not sell;[88] and we must admit that there are also decisions stating in general terms that he has no authority to sell property upon which he has not levied. If the property was sufficiently described in the notice of sale, and at the sale there was no fatal uncertainty respecting its subject, we think such sale and a conveyance pursuant to it transfer the defendant's title, notwithstanding any errors in description in the endorsement of the levy on the writ.[89] Dicta are sometimes to be found affirming that, the transfer of title by execution being involuntary, the defendant cannot be presumed to have any intention to give the deed or levy effect, and hence, it has been claimed that greater strictness of description is essential than in other instruments purporting to affect the title to real property. This is not true. So far as descriptive words are involved, they will be given the same force when employed in endorsing or making a levy, or in attempting to transfer title pursuant to a sheriff's sale, as if employed in a voluntary conveyance.[90]

[88] O'Kelley v. Gholson, 89 Ga. 1; Bird v. Burgsteiner, 100 Ga. 486; Fitch v. Pinckard, 4 Scam. 69; Herrick v. Morrill, 37 Minn. 250, 5 Am. St. Rep. 841; Pfeiffer v. Lindsay, 66 Tex. 123.

[89] Hopping v. Burnam, 2 G. Greene, 39; Manning v. Dove, 10 Rich. 395; Fitch v. Boyer, 51 Tex. 336.

[90] Colcord v. Alexander, 67 Ill. 583; Herrick v. Morrill, 37 Minn. 250, 5 Am. St. Rep. 841; Dygert v. Pletts, 25 Wend. 402; Smith v.

Digitized by Google

We shall now consider the question of the description of the realty levied upon, supposing the question to arise, where the description indorsed on the writ has been copied into the notice of sale and deed, or where, though not so copied, the courts have held that an insufficient description of the levy cannot be cured by a perfect description in the notice of sale and deed. Where the description is so imperfect that it cannot be ascertained therefrom what property was levied upon or sold, the proceedings must be regarded as void, and, as a general rule, cannot be supported by showing by the officer what he intended to sell.[91] The intention must be made manifest by the proceedings themselves. In Pennsylvania, however, where doubt existed as to what lands were sold, the fact that the purchaser had taken, and for many years held, possession of a particular tract, was adjudged to be a circumstance proper for the consideration of the jury, as tending to produce the conviction that the tract so taken by him was the one which was sold.[92]

A description may be so imperfect as to designate no tract of land whatever, or as to be equally applicable to two or more tracts. In either event it is worthless, and, if carried into the notice of sale and deed, must inevitably render them void.[93] A description which is equally applicable to two or more tracts of land is perhaps more difficult to sustain than any other,[94] unless

Crosby, 86 Tex. 20, 40 Am. St. Rep. 818; Benson v. Cahill (Tex. Civ. App.), 37 S. W. 1088.

[91] Mason v. White, 11 Barb. 173.

[92] St. Clair v. Shale, 20 Pa. St. 105.

[93] Gault v. Woodbridge, 4 McLean, 329; Stout v. Cook, 37 Ill. 283; Williamson v. Perkins, 1 Har. & J. 449; Dorsey v. Dorsey, 28 Md. 388; Morrisey v. Love, 4 Ired. 38.

[94] Holder v. American I. & L. Co., 94 Ga. 640; Fitch v. Pinckard, 4 Scam. 69; Hammett v. Farmer, 26 S. C. 566.

Digitized by Google

there is something in the attendant circumstances or the situation of the parties which may be referred to and in substance read as a part of the description.

The following levies have been adjudged void for uncertainty in description: "On 240 acres out of" a designated tract containing 280 acres;[95] "on a part" of a designated tract;[96] "on one law-office and lot of ground";[97] "on all the unsold lands in the bounds of Overton county belonging to the heirs of McIver, and which lie within the bounds of the 40,000-acre tract granted by the state to Donnelly and Farrell, by grant No. 289";[98] "on lot No. —, in the town" of G.;[99] "on 8,000 acres of land lying in four different tracts";[100] "on a tract adjoining J. McDonnel, Thomas Cannon, and others, containing 160 acres";[101] "on 1,950 acres, part of a tract of 2,500 acres, located by Daniel Gilchrist";[102] "on three tracts of land, one containing 300 acres, one containing 40 or 50 acres, and one other tract containing 110 acres, as the property of Haywood Cozart";[103] "on 350 acres of land, the property of Edmund Collins";[104] "on all lands of the defendant lying on Queen's Creek";[105] "on 500 acres to be taken off the north end of Alexander Shield's part," Shields being a cotenant whose part was not segregated from that of

[95] Deloach v. State Bank, 27 Ala. 437.
[96] Waters v. Duvall, 6 Gill & J. 76; Fenwick v. Floyd, 1 Har. & G. 172; Clemens v. Rannells, 34 Mo. 579.
[97] Dorsey v. Dorsey, 28 Md. 388.
[98] Huddleston v. Garrott, 3 Humph. 629.
[99] Brown v. Dickson, 2 Humph. 395, 37 Am. Dec. 560.
[100] Pound v. Pullen, 3 Yerg. 338.
[101] Helms v. Alexander, 10 Humph. 44.
[102] Brigance v. Erwin, 1 Swan. 375, 57 Am. Dec. 779.
[103] Taylor v. Cozart, 4 Humph. 434, 40 Am. Dec. 655.
[104] Lafferty v. Conn, 3 Sneed, 221.
[105] Huggins v. Ketchum, 4 Dev. & B. 414.

Digitized by Google

his cotenants;[106] "on the lands of Samuel Fennels";[107] "on a certain lot situate at the angle of Second and State streets, in the town of Alton," there being four different angles formed by these streets;[108] "on one-half of lot 60, in the town of Evansville";[109] "on three tracts of land, containing 360 acres, on Caney Fork";[110] "upon the life interest of Mrs. Ann E. Walton, in 600 acres of land, more or less, lying in the county of Morgan, adjoining the land of J. A. Broughton, J. J. Clack, and others";[111] "on 126 acres of land as the property of M. O. Elder";[112] "on about 90 acres of land lying on the west side of said factory tract, and west of Alcora river";[113] "on lots of land numbers 308, 309, 310, 332, all levied on as the property of Enoch C. Brown, to satisfy an execution issued from the 957th district of Baker county";[114] on "150 acres of land out of the I. E. Austin grant, on the west side of Brazos river, seven or eight miles above the town of Columbus";[115] on "lot 7 of the subdivision of lots 12, 13, and 14 of the Labrope and Baker farms, in Detroit," where the lands intended were "lot 7 of John Gibson's subdivision of lots 12, 13, 14, and 18 of the Labrope and Baker farms, situated on the south side of Pine street, between Sixth and Seventh";[116] a levy "on lots of land numbers 308, 309, 310, 322, all levied

106 Shields v. Batts, 5 J. J. Marsh. 13.
107 Borden v. Smith, 3 Dev. & B. 34.
108 Fitch v. Pinckard, 4 Scam. 69.
109 Porter v. Byrne, 10 Ind. 146, 71 Am. Dec. 305; Gault v. Woodbridge, 4 McLean, 329.
110 Chasteen v. Phillips, 4 Jones, 459, 69 Am. Dec. 760.
111 Few v. Walton, 62 Ga. 447.
112 Osborn v. Elder, 65 Ga. 360.
113 Phillips v. White, 66 Ga. 753.
114 Brown v. Moughon, 70 Ga. 756.
115 Donnebaum v. Tinsley, 54 Tex. 362.
116 Burrowes v. Gibson, 42 Mich. 121.

Digitized by Google

on as the property of E. C. B., to satisfy an execution issued from the 957th district, Baker county," there being nothing to indicate the locality of the lots or the county or district in which they are situate;[117] a levy on "one hundred acres of land, as the property of W. E. L., bounded as follows: north by Dr. W., west by the Central railroad," there being two branches of that road, and no other boundaries being given;[118] a levy on "640 acres of land on the San Jacinto, conveyed by Henderson and Gallagher," neither of these persons being the defendant in execution;[119] a levy on one-half of a lot without stating whether it was an undivided half, or showing, if divided, where it was located.[120] If, in Illinois, land is described as the west or east side or end of a lot or other tract of land, it will be presumed that the levy on the tract was intended to include the one-half thereof lying on the end or side designated.[121]

In some instances descriptions apparently perfect have been declared insufficient, because they, in fact, failed to disclose anything like the true property to be sold. Thus, in Missouri, a tract of land had been laid out as a town, and many lots had been sold to various persons. Afterward an execution against one of the owners of the original tract was levied, and a sale was made. The levy and sale described the original tract correctly, making no reference to the lots sold, and attempting no special designation of those unsold and intended to be levied upon. The court held that the

117 Brown v. Moughon, 70 Ga. 756.

118 Brinson v. Lassiter, 81 Ga. 40.

119 Hayes v. Gallagher (Tex. Civ. App.), 51 S. W. 280.

120 Keaton v. Forrester, 63 Ga. 206.

121 Chinigrey v. People, 78 Ill. 570; Winslow v. Cooper, 104 Ill. 235; Hill v. Blackwelder, 113 Ill. 283.

Digitized by Google

defendant's interest, because it embraced certain lots susceptible of accurate description, could not be seized and sold under a general designation embracing the whole of the original tract.[122] In other words, if a defendant owns several lots in a town or city, they cannot be transferred from him by a levy and sale of all his interest in such town or city. This is because his interest, and that of persons intending to purchase, require that the subject-matter of the sale be well known and clearly identified. Upon the same principle it has been held, in Louisiana, that when the interest of an heir is to be sold the quantity of the interest should be stated or the number of the heirs given.[123]

It must by no means be inferred that the description must be such that the property can always be located by mere inspection of the entry of the levy or of the deed. The terms used must always be sufficient to identify the property. Those terms, however, need not be such as are understood by all persons, nor by any person not having some familiarity with the property, or with the portion of the country in which it is situated. Thus, the term "the Penyrorsedd farm" is one not likely to be understood except by a person familiar with the neighborhood in which that farm is located. But it is clear that this term is sufficiently descriptive of property in an inquisition under an elegit.[124] Parol evidence is always admissible for the purpose of enabling the court to understand the terms used in a description; and if, from such evidence, it appears that

[122] Evans v. Ashley, 8 Mo. 177; Henry v. Mitchell, 32 Mo. 512; explained in Rector v. Hartt, 8 Mo. 448, 41 Am. Dec. 650.

[123] Gales v. Christy, 4 La. Ann. 295; Dearmond v. Courtney, 12 La. Ann. 251.

[124] Roberts v. Parry, 2 Dowl. & L. 430; 13 Mees. & W. 356; 8 Jur. 963; 14 L. J. Ex. 20.

Digitized by Google

those terms, as commonly understood in the neighborhood, clearly designate the property levied upon or sold, the description must be regarded as sufficient.[125] Hence the following levies, when aided by evidence explaining the terms employed in the description, have been sustained: "On a tract on which G. B. now lives, adjoining R. B., and supposed to contain eighty acres";[126] "on one tract of land adjoining lands of I. C., Mrs. G., and others, containing two hundred acres";[127] "on a tract on which J. lately resided, and which was devised by S. to D.";[128] "on part of a tract called P., now in the possession of D.";[129] "on the undivided third part of the lots in the S. B. & L. addition to St. Louis";[130] "on the Boonville tract";[131] "on the north side of lot one, in the occupation of F.";[132] "on 320 acres, more or less, adjoining John Hollingsworth, where John Blair now lives";[133] "on lots Nos. 1, 2, 3, 4, 5 in the subdivision of the Truman property, as surveyed and platted by Sage in September, 1867, in the 14th district of Fulton county, as the property of C. C. W.," though the plat referred to had never been

[125] Jackson v. Walker, 4 Wend. 462; Boylston v. Carver, 11 Mass. 515; Hedge v. Drew, 12 Pick. 141, 22 Am. Dec. 416; Landes v. Perkins, 12 Mo. 238; Bates v. Bank of Missouri, 15 Mo. 309; Vance v. McNairy, 3 Yerg. 171; Biggs v. Blue, 5 McLean, 148; Jones v. Austin, 10 Ired. 20; Laughlin v. Hawley, 9 Colo. 170; Christian v. Mynatt, 11 Lea, 619; Wiggins v. Gillette, 98 Ga. 20, 44 Am. St. Rep. 123; Belk v. Estes, 82 Ga. 238; Wildasin v. Bare, 171 Pa. St. 387; Smith v. Crosby, 86 Tex. 15, 40 Am. St. Rep. 818.

[126] Webb v. Bumpass, 9 Port. 201, 33 Am. Dec. 310.

[127] Randolph v. Carlton, 8 Ala. 606.

[128] Balch v. Zentmeyer, 11 Gill & J. 267.

[129] Murphy v. Cord, 12 Gill & J. 182.

[130] Lisa v. Lindell, 21 Mo. 127, 64 Am. Dec. 222.

[131] Hart v. Rector, 7 Mo. 531.

[132] Douglass v. McCoy, 5 Ohio, 522.

[133] Swartz v. Morse, 5 Serg. & R. 257.

Digitized by Google

recorded;[134] "on about one hundred and forty acres of land near Eminence, Henry county, the property of the defendants";[135] "on all right, title, and interest of the defendant, J. M. S., in and to league number 6, Galveston county, originally granted to S. E. B., and known as the Virginia Point league";[136] "on a tract in the name of Mordecai Massey, containing three hundred acres, more or less";[137] "on a tract now in the hands and possession of Caleb Inman, and being the heirship of John Inman in the estate of Richard Inman";[138] "on the right, title, and interest that John Doak has in seventy acres of land on the waters of the west fork of Stone's River";[139] "on two tracts of land of the defendant's, lying in Sevier county, in the sixth district, one of said tracts containing 122 acres, and the other 140 acres";[140] "on three tracts known as 'the Home place,' 'the Lynn place,' and the 'Leonard Gleeson place,' containing four hundred acres, and belonging to Julius Coley";[141] "on the interest of Abraham Paul in 450 acres, more or less, adjoining lands of G. S. McLean, D. McCallum, John McLean, and others";[142] "on all lands of the defendant lying on the headwaters of Ketchum's Mill Pond, adjoining lands of Ketchum";[143] "on a tract in Dagsborough Hundred, county of Sussex, containing 140 acres, more or less,

[134] Wiggins v. Gillette, 93 Ga. 20, 44 Am. St. Rep. 123.
[135] White v. O'Bannon, 86 Ky. 93.
[136] Smith v. Crosby, 86 Tex. 15, 40 Am. St. Rep. 813.
[137] Hyskill v. Givin, 7 Serg. & R. 369.
[138] Inman v. Kutz, 10 Watts, 90.
[139] Swan v. Parker, 7 Yerg. 490.
[140] Trotter v. Nelson, 1 Swan, 7.
[141] Smith v. Low, 2 Ired. 457. In all the cases where we have used initials, the descriptions from which we have quoted used the full names and also showed in what county the lands were.
[142] McLean v. Paul, 5 Ired. 22.
[143] Huggins v. Ketchum, 4 Dev. & B. 414.

Digitized by Google

adjoining lands of Jos. Kollock and others, a part of which is cypress swamp";[144] "on a certain ranch claim situate in the North Fork of Elk Horn Gulch, Gilpin county, Colorado, and containing eighty acres of land, being the same property formerly owned by one John Eicher, and purchased by him from one Stacy, and conveyed to said Rollins by said Eicher";[145] "on the house and lot formerly owned by J. D. Waddell, and now occupied by Henry May, on the office formerly owned by Chisholm and Waddell, now occupied by Liddel and Chisholm, and on the house and lot formerly owned by V. B. Burton, and now occupied by W. W. Garrett, all situated in Cedartown, in Polk county";[146] on "two hundred acres of land, the property of the defendant, lying in the eighth civil district of Grainger county, on the dividing line between Knox and Grainger counties, adjoining the lands of Joseph Mynatt's heirs, Martha Smartt, and others."[147] A description which establishes three sides of the land levied upon is sufficient. "If nobody owned on the fourth side, a straight line would close the hiatus; if any one did own on that side, the boundary would be controlled by that ownership."[148] Lands were described as "two lots of land, known as the house-lot and mill-lot of the within-named Levi Lee, sections 29 and 20, township 42 north, range 4 east, of 3 P. M., De Kalb county." The lands levied upon were all in section 20. The court decided that all reference to the sections might be disregarded as repugnant, and the levy thereby sustained, saying: "If, then, we reject all reference to the sections in this de-

144 Swiggett v. Kollock, 3 Houst. 326.
145 Laughlin v. Hawley, 9 Colo. 170.
146 Longworthy v. Featherston, 65 Ga. 165.
147 Christian v. Mynatt, 11 Lea, 619.
148 Stephens v. Taylor, 6 Lea, 307; Easley v. McLaren, 1 Baxt. 1.

Digitized by Google

scription, we would have this: Two lots of land known as the house-lot and mill-lot of the within-named Levi Lee, township 42 north, range 4 east, 3 P. M.; and, from the authorities, we are warranted in treating this as the description. Is, then, this a sufficient description? We think it is. Had the land been described as tracts of land, as farms, or as quarter-sections, known as the house-farm, etc., and the mill-farm, etc., we presume there would be no difficulty in identifying the premises by extrinsic evidence, which is always admissible for that purpose; and we are of opinion that describing these tracts of land as lots renders the description such as to easily locate and identify the lands. The question is, Where is the house-lot? And when it is identified, then it must be held to embrace the entire tract upon which the house is situated; and so of the tract on which the mill is situated. The levy, judgment, execution, and sheriff's deed, then, must be held to have passed the land to the grantee of the sheriff." [149] The rule that, when a deed or instrument contains several elements of description, and it is apparent that some of them are false or mistaken, they will be rejected and not permitted to vitiate the balance, is not less applicable to endorsements of levies and to descriptive words in sheriffs' deeds than to any other conveyance or writ.[150] A deed on record may be referred to by the officer, and made a part of his description.[151] At one time it was doubted whether a conveyance or other instru-

[149] Swift v. Lee, 65 Ill. 340.

[150] Boggess v. Lowrey, 78 Ga. 539, 6 Am. St. Rep. 279; Beardsley v. Hilson, 94 Ga. 50; Ela v. Yeaw, 158 Mass. 190.

[151] Solomon v. Breazeal, 27 Ga. 200; Sears v. Bagwell, 69 Ga. 429; but see Crosby v. Dowd, 61 Cal. 557.

Digitized by Google

ment could be referred to for the purpose of a description in an instrument creating or transferring a title by judicial or execution sale, and the view was advanced that, for the purpose of such a sale, the description should be complete in the deed and other writings evidencing the sale and the necessary antecedent proceedings. Whatever doubt may have existed on the subject has been removed by the overruling of the decisions creating it.[152]

The name of the county in which the lands are need not be specified if the description is otherwise so perfect that their identity is not left in doubt;[153] and we think it must be presumed, in the absence of any statement in the description, that the lands are within the territorial limits of the levying officer's jurisdiction.

§ 282. The Effect of the Levy.—"A return of 'lands delivered' on an elegit is a legal satisfaction of the judgment,[154] though the debtor's interest in the land and its income is set off to the creditor at a yearly value, to continue for a term of years, should the debtor so long live, and he, having only a life estate, die before the expiration of the term of years."[155] But the nature of proceedings by levy and sale under execution is entirely different from that which formerly resulted in the setting off to the creditor of sufficient lands of the debtor to discharge the debt. By a levy of land under execution the creditor acquires no property in the land, absolute or conditional. Such levy, unless

[152] De Sepulveda v. Baugh, 74 Cal. 468, 5 Am. St. Rep. 455, overruling Crosby v. Dowd, 61 Cal. 557, and Hill v. Ware, 66 Cal. 130; Hermann v. Likens, 90 Tex. 448; Watson v. McClane, 18 Tex. Civ. App. 212.

[153] Wright v. Watson, 11 Humph. 529.

[154] Hinesly v. Hunn's Adm'r, 5 Harr. (Del.) 236.

[155] Thomas v. Platts, 43 N. H. 629; Pratt v. Jones, 22 Vt. 341; Blumfield's Case, 5 Rep. 87 a.

Digitized by Google

consummated by a sale (and then only to the extent of the proceeds realized), is no satisfaction of the judgment.[155a] In Indiana, however, a levy upon real estate is, like a levy on personalty, a prima facie satisfaction of the judgment.[156] Where a levy on real estate is not regarded as a conditional satisfaction of the judgment it constitutes no plea in bar to an action or a scire facias on the same judgment;[157] but, doubtless, the court in which the second action is pending might stay proceedings therein until a subsisting levy was disposed of.[158]

With respect to making a second levy while a former levy on real estate remains in force, it is said[159] that the court will so control its process as to prevent the plaintiff from harassing defendant and putting him to unnecessary cost, by abandoning a levy on land and proceeding to make a "new levy on other property."[160] The second levy is not, in any case, invalid, and will in all cases support a sale made thereunder.[161] In most of the New England states, lands are extended under execution, and set off to the creditor, instead of being

[155a] Cassell v. Morrison, 8 Ill. App. 175; White v. Graves, 15 Tex. 133; Hoard v. Wilcox, 47 Pa. St. 60; Robinson v. Brown, 82 Ill. 279; Spafford v. Beach, 2 Doug. (Mich.) 150; Reynolds v. Rogers, 5 Ohio, 169; Overton v. Perkins, 10 Yerg. 328; Fry v. Branch Bank, 16 Ala. 282; Hammond v. Myrick, 14 Ga. 77; Gold v. Johnson, 59 Ill. 62; Everingham v. National City Bank, 124 Ill. 527; Wood v. Conrad, 2 S. D. 405.

[156] Neff v. Hagaman, 78 Ind. 57; Lindley v. Kelley, 42 Ind. 294; McCabe v. Goodwine, 65 Ind. 288.

[157] Deloach v. Myrick, 6 Ga. 410; Patterson v. Swan, 9 Serg. & R. 16; Beazley v. Prentiss, 13 Smedes & M. 97; Shepard v. Rowe, 14 Wend. 260; Taylor v. Ranney, 4 Hill, 619; Ladd v. Blunt, 4 Mass. 402; Boyd v. Mann, 9 Baxt. 349.

[158] Gregory v. Stark, 3 Scam. 612; Shepard v. Rowe, 14 Wend. 260.

[159] Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338.

[160] Freeman on Judgments, § 474.

[161] Robinson v. Brown, 82 Ill. 279.

Digitized by Google

sold. It is not until the officer has delivered seisin to the creditor, and it has been accepted by him, that the extent becomes final, and the title to the real estate divested. Hence, under this system, as well as where the lands taken are sold, the mere levy of the execution upon real estate cannot operate as a satisfaction thereof. In Kentucky, however, a levy upon lands must be disposed of before a subsequent fieri facias can issue on the same judgment; and, if such writ is so issued, it, and all proceedings based thereon, may be quashed on motion.[162]

The levy upon lands during the life of a judgment lien cannot prolong such lien beyond the period prescribed by statute. The sale must take place during the life of the judgment lien, or the purchaser can acquire only the title which the defendant held at the date of the levy.[163] The only effect of the levy of an execution upon real estate is to make the actual interest of the defendant therein liable to be taken and sold to satisfy the writ, and to make the title deraigned through such sale paramount to all conveyances and encumbrances made subsequent to the levy.[164] A levy is not displaced by proceedings subsequently instituted in bankruptcy against the judgment debtor, unless it can be successfully assailed as a fraudulent preference, prohibited by the statute.[165] It creates a vested right, such as the legislature has no power to impair by taking it away and giving precedence to

[162] Hopkins v. Chambers, 7 T. B. Mon. 257.

[163] Freeman on Judgments, § 394; Bank of Mo. v. Wells, 12 Mo. 361, 51 Am. Dec. 163; Hastings v. Bryant, 115 Ill. 69; ante, § 205.

[164] Young v. Schofield, 132 Mo. 650; post, § 333.

[165] Fleming v. Butts, 63 Ga. 231; Elston v. Castor, 101 Ind. 426, 51 Am. Rep. 754; see ante, § 205.

Digitized by Google

some subsequent lien or claim.[166] "The levy of an execution on lands, unlike a levy or seizure of personal property, confers no right or title on the sheriff, and such levy does not constitute him a trespasser, although the lands may not belong to the defendant in execution, and may be in possession of a third person." [167]

A judgment or execution lien or the lien of a levy, in the absence of a statute giving it a different effect, attaches only to the interest which the defendant actually has in the property levied upon, and is hence subordinate to conveyances and encumbrances previously made by him, though not of record and not known to the plaintiff in execution.[168] This question is controlled everywhere by local statutes. These, in some of the states, put the plaintiff, where a levy is made on real property, on the same footing with a purchaser for value, and, hence, give his lien precedence over unrecorded instruments of which he had no notice at the time of his levy.[169]

[166] Williamson v. New Jersey etc. Co., 29 N. J. Eq. 311; McKelthan v. Terry, 64 N. C. 25.

[167] Eslava v. Jones, 83 Ala. 139, 3 Am. St. Rep. 699.

[168] McAdow v. Black, 4 Mont. 475.

[169] Main v. Alexander, 9 Ark. 112, 47 Am. Dec. 732; Hawkins v. Files, 51 Ark. 417; Williams v. Mellor, 12 Colo. 1; Hathaway v. Howell, 54 N. Y. 97; Houk v. Condon, 40 Oh. St. 569.

Digitized by Google

CHAPTER XIX.

PROCEEDINGS FROM THE LEVY TO AND INCLUDING THE SALE.

§ 283. General synopsis of the officer's duties.
§ 284. The appraisement.
§ 285. Notifying the defendant of the sale.
§ 285a. Notice of sale, general requisites of.
§ 285b. Notice of sale, describing the property.
§ 285c. Notice of sale, designating the time.
§ 285d. Notice of sale, designating the place.
§ 285e. Publication of notice of sale.
§ 286. The effect of sales where the notice is not properly given.
§ 287. The time of the sale.
§ 288. The power to adjourn sales, and when it should be exercised.
§ 289. The place for selling real estate.
§ 290. The place for selling personal property.
§ 291. By whom the sale may be made.
§ 292. To whom the sale may be made.
§ 293. The sale must be to the highest bidder.
§ 293a. Terms of sale, officer's control over.
§ 293b. The order of offering the different parcels.
§ 294. Whether a sale must be conducted under the law in force at the sale or at the making of the contract.
§ 295. Of subdividing single tracts into parcels.
§ 296. Of selling two or more distinct tracts en masse.
§ 297. Of combinations and devices to depress the biddings.
§ 298. Of combinations to stimulate the biddings by puffing.
§ 299. Of making a memorandum of the sale.
§ 300. General observations concerning the conduct of the sale.
§ 301. Of the payment of the bid.
§ 302. Of liability of officers for wrongful sales.
§ 303. Of liability of plaintiffs for wrongful sales.
§ 304. Of liability of officers for refusing or neglecting to sell.

§ 283. General Synopsis of the Duties of Officers from the Levy to the Sale.—When a levy has been perfected, it is the duty of the officer to keep within his control the personal property levied upon, and to see that it

Digitized by Google

is properly cared for, so that it shall not be lost, nor its value depreciated for want of that degree of attention which is usually given to like property while in the charge of prudent owners. Whether the officer be acting under an execution from a court of law, or an order of sale issued out of chancery, it is his duty to proceed by sale to realize the satisfaction of his writ. If parties other than the plaintiff are interested in compelling the sale, he is not at liberty to delay it indefinitely. "If the complainant neglects to proceed to a sale with due diligence, the court, upon the application of any other party interested in the execution of the decree, will commit the prosecution thereof to him; or if the decree has already been placed in the hands of the master to be executed, will direct him to proceed to a sale without delay, notwithstanding any directions he may receive to the contrary from the complainant or his solicitor. Indeed, it is the duty of the master, without any special order of the court for that purpose, to proceed to a sale of the property with all reasonable diligence, if requested to do so by any party to the suit who must necessarily be injured by the delay if the sale is stayed without sufficient cause." [1] Where the law requires an appraisement, the officer must see that it is made in the time and mode prescribed by the statute. After the appraisement he must give notice of the sale. At the time and place specified in the notice he must attend, either in person or by deputy, and take charge of the sale. The sale must be at public auction, to the highest bidder. The officer may employ an auctioneer for the purpose of crying the bids, but he cannot authorize such auctioneer to take general charge of the sale.

[1] Kelly v. Israel, 11 Paige, 158.

Digitized by Google

If it appears that the time selected is unfavorable, and is about to lead to an unusual sacrifice of the property, the officer should adjourn the sale to some subsequent date. He must have the personal property present at the sale, and, if possible, it must be so situated that it can be freely inspected by all persons desirous of bidding. Where both real and personal property are under levy, the latter should be first sold. In Indiana, before any parcel of real estate can be sold, its rents and profits for a term of seven years must first be offered, and it must not be sold unless its rents and profits for such term will not bring sufficient to satisfy the writ.[2] The only exception to this rule is, that by statute, if property has been sold with intent to hinder, delay, or defraud creditors, it may be sold under execution without any previous appraisement.[3] To invoke the benefit of this statute, it must appear that there has been a previous judgment or decree declaring fraudulent the transfer sought to be assailed, and if, in the absence of such a decree, a sale of real property is made without first offering the rents and profits, such sale is void.[4] In Delaware, the officer must inquire, by two disinterested freeholders, whether the rents and profits for seven years will satisfy the writ, and if so, the lands must be extended by elegit. If such rents and profits are adjudged insufficient, a

[2] Piel v. Watson, 44 Ind. 447; Brounfield v. Welcht, 9 Ind. 394; Thurston v. Barnes, 10 Ind. 289; Adler v. Sewell, 29 Ind. 598. The notice of the sale need not state that the rents and profits will be offered for sale. Brounfield v. Welcht, 9 Ind. 394. The rents and profits must be appraised before sale. Ind. C. R. W. Co. v. Bradley, 15 Ind. 23. Where real estate has been sold, it will be presumed that the rents and profits were first unsuccessfully offered, unless the record shows otherwise. Law v. Smith, 4 Ind. 56.

[3] Mugge v. Helgemeier, 81 Ind. 120.

[4] Milburn v. Phillips, 136 Ind. 680.

Digitized by Google

venditioni exponas issues for the sale of the lands.[5] The officer must avoid having any personal interest in the sale. Neither he nor any of his deputies must directly or indirectly bid, nor allow themselves to occupy any position nor to assume any duty which would tend toward an improper exercise of their official discretion

[5] Laws of Delaware, 1893, p. 831, § 6. The procedure upon a levy of a writ upon real estate is very similar in Pennsylvania to what it is in Delaware. In Pennsylvania, it is the sheriff's "duty to summon an inquest for the purpose of ascertaining whether the rents and profits of such real estate, beyond all reprises, will be sufficient to satisfy, within seven years, the judgment upon which such execution was issued, with the interest and costs of suit; and he shall make a return in due form of law, of the inquisition so taken to the court with the writ." Brightly's Purdon's Digest, p. 646, sec. 55. Under this statute, it has always been held that a sale might be made without inquisition of an estate for years (Dalzell v. Lynch, 4 Watts & S. 255; Williams v. Downing, 18 Pa. St. 60; Macalester v. Wistar, 2 Miles, 156); and also of estates for life, and all other estates of uncertain duration. Howell v. Woolfort, 2 Dall. 75; Humphreys v. Humphreys, 1 Yeates, 427; Burd v. Dansdale, 2 Binn. 80; Stewart v. Kenower, 7 Watts & S. 288. Since 1840, however, estates for life in improved lands, yielding rents or profits, cannot be sold under execution. They must be made available to the judgment creditor by proceedings to sequester their rents and profits. Brightly's Purdon's Digest, p. 652; Parget v. Stambaugh, 2 Pa. St. 485; Eyrick v. Hetrick, 13 Pa. St. 488. A sale of lands without inquisition is void. Baird v. Lent, 8 Watts, 422; Gardner v. Sisk, 54 Pa. St. 506; Wolf v. Payne, 35 Pa. St. 97. The owner of the property to be sold may, in writing, waive the inquest. Wray v. Miller 20 Pa. St. 111; St. Bartholomew Church v. Wood, 61 Pa. St. 96. It may also be waived by an administrator (Hunt v. Devling, 8 Watts, 403); but not by an insolvent after executing an assignment (Pepper v. Copeland, 2 Miles, 419); nor by an attorney under the authority conferred by a general retainer (Hadden v. Clark, 2 Grant Cas. 107). The defendant must have notice of the inquisition, and may require it to be conducted on the premises which have been levied upon. Brightly's Purdon's Digest, p. 647, secs. 58, 59. If the clear profits of the real estate are found sufficient to pay within seven years the amount required to be raised, a writ of liberari facias issues, under which the property is delivered to the plaintiff. Brightly's Purdon's Digest, p. 648. If, on the other hand, the inquest finds the rents and profits to be insufficient, the plaintiff is entitled to a venditioni exponas for the sale of the property. Ib. 650.

Digitized by Google

over the sale. He must so subdivide the property as will, in his judgment, make it sell to the best advantage, and must discontinue the sale as soon as sufficient money has been realized to satisfy the writ. For, as soon as the judgment or decree is fully satisfied, he has no further warrant for proceeding; and whether he be a sheriff or a commissioner or master in chancery, a sale of any parcel, made after the amount he is authorized to collect has been realized, is probably void, and is certainly voidable at the instance of the injured party.[6] He must seek to avoid and discountenance all tricks, devices, and combinations to improperly depress or stimulate the bidding. He must endeavor to obtain the best price he can for the property, and must award it to the highest bidder. He must not assume powers not given him by law, such as making warranties of title, or annexing conditions to the sale not warranted by the statute. When the property is sold, he should make a memorandum of the sale, showing the amount bid, the property sold, and the name of the purchaser. He should then exact payment with reasonable, but not with oppressive promptness, and thereupon should execute a certificate of purchase or bill of sale. In case the payment of the bid is refused, he should resell the property, and proceed to collect from the first purchaser a sum equivalent to the loss resulting from the resale.

Perhaps by no means can we procure a more correct and just view of the duties of the sheriff or other officer in the proceedings which he is authorized to take, after levying upon property, for the purpose of producing a satisfaction of the plaintiff's demand, than by conced-

[6] Blakey v. Abert, 1 Dana, 185; Plummer v. Whitney, 33 Minn. 427.

Digitized by Google

ing that such officer is the agent of both parties,[7] and as such charged with duties which are not wholly compatible, and which must, nevertheless, be reconciled. It is true that the officer owes to the plaintiff the duty of making the money at or before the return day of the writ, and may be considered as the agent of the plaintiff, charged with the duty of producing a satisfaction of the writ. On the other hand, the officer is equally the agent of the defendant, charged with the duty of so disposing of his property that the writ against him shall be satisfied with no needless injury or sacrifice. Hence, as the duty of selling the property is modified by the duty of not needlessly sacrificing it, the officer has a discretion with respect to the time and mode of sale. "There can be no iron rule which compels plaintiff and sheriff to have property levied upon sold at the earliest possible date. A reasonable discretion is allowed to be exercised in order that the object of the writ may be accomplished, not frustrated, and that the property of the debtor be not needlessly sacrificed."[8] "The law invests the sheriff with some discretion in making sales, and if for any reason the consummation of the sale, even if the property had been struck off, would operate with unusual or inordinate severity upon the debtor, by needlessly sacrificing his property, the sale ought not to be completed, especially if the purchaser consents to the withdrawal of his bid."[9] A sheriff may offer the property, if it consists of several parcels, for sale in various lots or groups for the purpose of ascertaining how the best price may be realized,

[7] Davis v. McCann, 143 Mo. 172.

[8] Matson v. Sweetser, 50 Ill. App. 518; Robbins v. Butler P. Co., 85 Ill. App. 512; Bergin v. Hayward, 102 Mass. 414.

[9] Maher v. Aetna L. I. Co., 116 Ind. 486, 9 Am. St. Rep. 880.

Digitized by Google

and may refuse to accept a bid for any parcel until he has satisfied himself of the mode in which the sale may be made for the greatest advantage.[10] Both execution and judicial sales have for their object not only the securing to the plaintiff of the amount due on his judgment, but also that the property shall bring all that full, fair, and free competition will produce for the benefit of others in interest.[11] It is the duty of the officer not to aid in the accomplishment of any unlawful purpose, though all the parties to the writ may consent thereto. Hence, in a state wherein the sale of intoxicating liquors is unlawful, it will not be presumed that the law was intended to prevent the bona fide sale of such articles under execution, but an officer will not be justified in employing his process for the purpose of evading the law, and if he does so, his process cannot constitute any protection to him, if prosecuted for violating the statute.[12]

§ 284. The Appraisement.—As the law will not tolerate the making of a levy for the mere purpose of acquiring and retaining a lien upon the property, it must, within a reasonable time, be succeeded by such steps as are necessary for a valid sale. In a few of the states one of the steps toward a sale of the property levied upon is to procure its appraisement. We do not here refer to an appraisement such as is required in some of the states when the property is claimed to be exempt from execution, and it is necessary to resort to the aid of an appraisement to ascertain the limit of an exemption and to set aside to the defendant property which cannot be subjected to the writ against him.

10 Barnes v. Zoercher, 127 Ind. 105.
11 De Grauw v. Mechan, 48 N. J. Eq. 218.
12 State v. Fearson, 102 Ga. 274.

Digitized by Google

The appraisement of which we here speak is of the property to be sold, and its object is, in advance of any sale, to ascertain the value of the property and to protect it from sale until a sum can be realized thereunder bearing some proportion to the amount of the appraisement. Thus, in Indiana, the statute declares that "the sheriff, immediately upon levying an execution, shall proceed to ascertain the value of the property levied upon," and it then provides the mode by which the appraisers shall be selected, and that they shall forthwith proceed to appraise the property according to its cash value at the time. The sheriff must furnish the appraisers with a schedule of the property levied upon, and they must fix and set down opposite to each parcel of real property and "of the several articles of personal property, the cash value, deducting liens and encumbrances." [13] In Iowa the appraisement laws apply only to personal property and to leasehold interests in real property "having less than two years of an unexpired term." [14] In Kentucky, on the other hand, personal property need not be appraised for the purposes of the sale. Real property may be advertised for sale before it is appraised, but it is not to be sold until after appraisement made by two appraisers appointed and sworn by the officer, and, if they cannot agree as to the value of the property, he must act as an umpire.[15] In Nebraska and Iowa officers levying on lands and tenements are required to appoint appraisers thereof, and in both states the statutes contemplate that the appraisement shall precede the ad-

[13] Burns Ind. St., 1894, §§ 745, 746, 749.

[14] Code Ia., 1897, § 4041.

[15] Barbour & Carroll's Ky. Stat., 1894, § 1682; Phelps v. Jones, 91 Ky. 244.

Digitized by Google

vertisement of the land for sale.[16] A new appraisement is authorized, in Nebraska, if real property has been twice offered for sale and remains unsold for want of bidders.[17]

After appraisers have been appointed, they should qualify in the mode prescribed by statute before entering upon the discharge of their duties. This qualification generally consists of the taking of their oath of office. The omission to take it may be deemed a sufficient ground for setting aside a sale, especially if there are other circumstances showing that the appraisement may have operated prejudicially to the defendant in execution.[18] Some of the states expressly provide that the appraisement must be upon actual view of the property.[19] This is necessarily implied where it cannot be supposed that an appraiser can perform his duty fairly and intelligently unless he has made himself acquainted with the property to be valued by him. It has been held that the view of the property must have been had after the appraiser had qualified by taking his oath of office.[20] Such view must be such as to fully qualify the appraisers for the performance of their duties. An appraisement made by going with an officer to one corner of a tract of land and without any inspection of the buildings, orchards, and growing crops

[16] Comp. St. Neb., 1897, §§ 6079, 6082; Glauque's Rev. St. Oh., 1896, §§ 5389, 5390; Reuland v. Waugh, 52 Neb. 358; Burkett v. Clark, 46 Neb. 466; Walker v. Patch, 53 Neb. 763.

[17] Comp. St. Neb., 1897, § 6085; Burkett v. Clark, 46 Neb. 466; First N. B. v. Hamer, 51 Neb. 23.

[18] Phelps v. Jones, 91 Ky. 244.

[19] Creditors v. Search, 4 West L. M. 319; Miller v. Loving, 59 Kan. 485. But the statutes of this state requiring the appraisement of property as a condition precedent to its sale seem to have been repealed.

[20] Alfred v. Bank, 48 Kan. 124.

Digitized by Google

will not support a sale based thereon. It "is not a substantial compliance with the requirements of the oath taken by the appraisers that they will appraise it upon actual view. It would be difficult to announce an exact rule declaring how minute the inspection they must make, but it may be said, in general terms, that they must see the whole property, and, from actual view, obtain such knowledge as will enable them to form an intelligent judgment as to its value. It may not be necessary to measure each field, or to take an inventory of all that is upon the land, but they should see and observe what improvements there are, and in a general way ascertain the extent and condition of the parts covered by growing crops and the size and character of the buildings, orchards, wells, and other improvements. In brief, their view should enable them to intelligently appraise the property." [21]

The appraisers must, in Ohio, value the whole property, making no deduction for mortgages or other encumbrances,[22] but excluding from their valuation any annual crops then growing or being on the premises.[23] In other states, the encumbrances must be considered. Thus, in Nebraska, the statute commands the appraisers to "deduct from the real value of the lands and tenements levied on the amount of all liens and encumbrances for taxes or otherwise, prior to the lien of the judgment under which the execution is levied, and to be determined as hereinafter provided, and which liens and encumbrances shall be specifically enumerated, and the sum remaining shall be the real value of the interest therein of the persons or corpora-

[21] Miller v. Loving, 59 Kan. 485.
[22] Baird v. Kirtland, 8 Ohio, 21.
[23] Cassilly v. Rhodes, 12 Ohio, 88.

Digitized by Google

tions against whom the execution is levied." For the purpose of ascertaining the amount of such liens, it is the duty of the county clerk, the clerk of the district court, and the county treasurer of the county, and the treasurer of the village, town, or city wherein the lands to be appraised lie, on application of the levying officer, to certify to him the amount and character of all liens on the property levied upon which are prior to the levy.[24]

"Tax deeds are not liens or encumbrances, within the meaning of the statute. A party claiming title under a tax deed, and for the time being at least, must rely upon his title."[25] It is not sufficient to estimate or appraise "the interest of the defendant" in the real property. The property must be appraised at its value in money, and the liens then deducted, each lien being specifically enumerated.[26] While appraisers may deduct encumbrances, they are not permitted to take into consideration adverse claims of title and to ascertain how much the defendant's title may be diminished in value thereby. They must, for the purposes of their appraisement, assume that his title is perfect, except in so far as it is subject to encumbrances.[27]

In Indiana, either party may furnish the sheriff with a list of liens and encumbrances, with the nature and amount of each. The sheriff must furnish the appraisers with a schedule of the property levied upon, with the encumbrances made known to him; and they must set opposite to each parcel its cash value, deducting liens and encumbrances.[28] Property was ap-

[24] Comp. Stat. Neb., 1897, §§ 6080, 6081.
[25] Sessions v. Irwin, 8 Neb. 5.
[26] Rosenfield v. Chada, 10 Neb. 421.
[27] McKeighan v. Hopkins, 19 Neb. 38.
[28] Burns St. Ind., 1894, §§ 748, 749.

Digitized by Google

praised at eleven hundred dollars without noticing encumbrances thereon amounting to two thousand five hundred dollars. The return of the appraisers had certified that "this appraisement is made upon the supposition that the title is clear of encumbrances, but if there are any liens, they are to be deducted from the above value." The property was subsequently sold, under the execution, for one dollar; and the sale was sought to be sustained on the ground that the sheriff had a right to consider the liens and encumbrances. The court, in effect, held that the liens could not be considered unless specifically set forth in the appraisement; and that the sale, being for less than two-thirds of the appraised value, could not be sustained.[29] If there are two or more lots which are subject to a joint encumbrance, the appraisers have no power to apportion it and fix the amount for which each lot shall be held liable. Hence, an appraisement is sufficient which fixes the value of each lot and the amount of the encumbrance to which both are subject.[30] In Iowa, it seems to be undecided whether the appraisers must estimate the encumbrances, or whether the party purchasing must do so at his peril. Where an action was brought in equity to set aside a sale "upon the ground that the property did not sell for such sum as, added to the encumbrances, amounted to two-thirds of the appraised value," it was held that the burden of proof was on the plaintiff; and that "if it should turn out that the sale was made for such sum, or if it does not affirmatively appear that it was not, the sale must be upheld, even if the amounts of the encumbrances were not ascertained by any one"; and, further, that the pur-

[29] Stumph v. Reger, 92 Ind. 286.
[30] Ross v. Banta, 140 Ind. 120.

Digitized by Google

chaser was justified in relying upon the public records in estimating the amount of the encumbrances, though it might be shown that one of the encumbrances appearing of record had been partly satisfied.[31]

The appraisers must, it has been held, all concur in the appraisement,[32] and must all reside in the neighborhood of the property appraised.[33] A party dissatisfied with the appraisement may assail it by motion in the court wherein the writ issued to vacate it, and for a new appraisement. If, however, there is no irregularity in the appointment, qualification, or proceedings of the appraisers, their determination must be regarded as quasi-judicial in character, and, hence, not to be interfered with by the court except upon a showing of fraud or mistake or such gross error in their valuations that fraud or mistake must be presumed.[34] A party cannot await the result of a sale and then interpose his objections to the appraisement. He must proceed by motion before the sale.[35] For the purpose of a sale the appraisement must be regarded as conclusive, and neither the parties nor the purchaser has any right thereafter to collaterally assail it as erroneous in any respect. It must be deemed and taken as if incorporated in, and made a part of, the terms of sale.[36]

[31] Barber v. Tryon, 41 Iowa, 349.

[32] Evans v. Landon, 1 Gilm. 307.

[33] Woods v. Smith, 38 Iowa, 484.

[34] Lawrence v. Edelin, 6 Bush, 55; Vought v. Foxworthy, 38 Neb. 790; Kearney etc. Co. v. Aspinwall, 45 Neb. 601; Nye v. Farenholz, 49 Neb. 276, 59 Am. St. Rep. 540; Brown v. Fitzpatrick, 56 Neb. 61.

[35] Kearney etc. Co. v. Aspinwall, 45 Neb. 601; Griffith v. Jenkins, 50 Neb. 719; Hamer v. McFeggan, 51 Neb. 227; Nebraska L. etc. Co. v. Cutting, 51 Neb. 647; Hoover v. Hale, 56 Neb. 67; Smith etc. T. Co. v. Weiss, 56 Neb. 210.

[36] Stumph v. Reger, 92 Ind. 286; Lawrence v. Edelin, 6 Bush, 55; Nye v. Fahrenholz, 49 Neb. 276, 59 Am. St. Rep. 540.

Digitized by Google

The debtor is entitled, if he so requests, to have distinct parcels of his real estate separately appraised.[37] Where there are several writs against the same defendant, one appraisement is sufficient.[38] After the appraisement is completed, the appraisers must make their return thereof, and deliver it to the officer holding the execution.[39] The appraisers, or some one of them, may not possess the qualifications prescribed by statute. Whether this fact will invalidate the subsequent sale is a question which has been very little considered; but so far as considered, the result seems to be that the disqualification is an irregularity merely, and is not of sufficient gravity to render the sale void.[40] The rule usually applied in cases of irregularities in the appointment or qualification of appraisers, or in the discharge of their duties is, that such irregularities do not make a subsequent sale void.[41] In Iowa a defendant was permitted to redeem from a sheriff's sale, after the statutory time for such redemption had terminated, upon showing that one of the appraisers lived thirty-five miles distant from the land, and was not a householder; and that the lands were appraised at less than one-half their value; and were sold to the judgment creditor, who still retained the title acquired by such sale.[42]

[37] Hartshorn v. Rider, 3 Law Gaz. 245.

[38] Douglass v. McCoy, 5 Ohio, 522; Daniels v. McBain, 2 Ohio St. 406.

[39] For form of return, see Platt v. Platt, 9 Ohio, 37.

[40] Hill v. Baker, 32 Iowa, 302, 7 Am. Rep. 193; Gapen v. Stephenson, 17 Kan. 613; Sullinger v. Buck, 22 Kan. 28. To this rule there are some exceptions, as where several parcels are seized as one piece of property, or are subject to a single mortgage, or other lien, or are in any other respect so situated that the officer may, in the exercise of his discretion, sell them en masse. Johnson v. Colby, 52 Neb. 327; Kane v. Jonasen, 55 Neb. 757.

[41] Davis v. Spaulding, 36 Ia. 610; Preston v. Wright, 60 Ia. 351.

[42] Woods v. Cochrane, 38 Iowa, 484.

Digitized by Google

The appraisement laws are intended to prevent the sacrifice of the defendant's property. To promote this object they usually provide that the sale shall not be for less than two-thirds of the appraised value of the property.[43] In Iowa, if the property appraised is offered for sale on three different days, and no bid is received equal to two-thirds of the appraised value, it may subsequently be sold for one-half of such value.[44] As the appraisement laws are for the protection of debtors, they may undoubtedly be waived by those for whose benefit they are enacted.[45] Frequently the waiver is made in the contract by which the debt is created.[46] The phrase in a contract, "waiving the appraisement laws," is sufficient to deprive the contractor of all benefit of appraisement.[47] If a note and mortgage are executed, the latter containing a waiver, and the former not, the mortgaged property may be sold without benefit of appraisement.[48] In Iowa, however, the statutes provide that the appraisers shall be chosen by the parties, but if either neglects or refuses to make a choice, the officer shall choose for him. This statute was construed as implying that an appraisement must be made in every instance, whether either of the parties desired it or not, and it was, hence, held that the defendant in execution might not waive such appraisement, and that

[43] Burns St. Ind., 1894. § 744; Comp. St. Neb., 1897, § 6082; Glauque's Rev. St. Oh., § 5391; Sargent v. Pitman, 16 Ia. 469.

[44] Code Ia., 1897, § 4041.

[45] Stockwell v. Byrne, 22 Ind. 6; Desplate v. St. Martin, 17 La. Ann. 91; New O. M. Ins. Co. v. Bagley, 19 La. Ann. 89; Overton v. Tozer, 7 Watts, 331.

[46] Deam v. Morrison, 10 Ind. 367; Smith v. Doggett, 14 Ind. 442; Baker v. Roberts, 14 Ind. 552. When the waiver is in the contract, the judgment should state that the sale may be made without appraisement.

[47] Vesey v. Reynolds, 14 Ind. 444.

[48] Harris v. Makepeace, 13 Ind. 560.

Digitized by Google

a sale might be vacated for want of an appraisement, though he or his agents were present at such sale and made no objection thereto.[49] It is not indispensable that the return of the officer on the execution should show that the property was appraised; for in the absence of all proof upon the subject, an appraisement will probably be presumed,[50] and may certainly be established by proof outside of the return.[51] The defendant is entitled—1. To have his property appraised prior to the sale; and 2. To have it remain unsold unless some bid shall be offered equivalent to two-thirds of the value of the property. In the absence of such an appraisement, or of such a bid, the courts have usually held that the officer has no power to make a sale, and, therefore, that if he does assume to sell and convey the property, his acts are so without legal authority or support as to be utterly void.[52] Sometimes a different and perhaps a more rational view has been taken of this question. Under this last view the defendant who, without objection, suffers his property

[49] Minneapolis T. M. Co. v. Beck, 95 Ia. 725.

[50] Evans v. Ashby, 22 Ind. 15; Hale v. Talbot, 86 Ind. 447; Ferrier v. Deutchman, 81 Ind. 390.

[51] Thurston v. Barnes, 10 Ind. 289.

[52] Capital Bank v. Huntoon, 35 Kan. 577; Brown v. Butters, 40 Iowa, 544; Hefferlin v. Sinsinderfer, 2 Kan. 401, 85 Am. Dec. 593; Gantly v. Ewing, 3 How. 707; Maple v. Nelson, 31 Iowa, 322; Smith v. Cockrill, 6 Wall. 756; Harrison v. Doe, 2 Blackf. 1; Morss v. Neal, 2 Ind. 65; Tyler v. Wilkerson, 27 Ind. 450; Babcock v. Doe, 8 Ind. 110; Cummings v. Pfouts, 13 Ind. 144; Davis v. Campbell, 12 Ind. 192; Indiana Central Railway Co. v. Bradley, 15 Ind. 23; Evans v. Ashby, 22 Ind. 15; Fletcher v. Holmes, 25 Ind. 458; Sprott v. Reid, 3 G. Greene, 497, 56 Am. Dec. 549; Collier v. Stanbrough, 6 How. 14; Strouse v. Drennan, 41 Mo. 289; Baird v. Lent, 8 Watts, 422; Succession of Hiligsberg, 1 La. Ann. 340; Gardner v. Sisk, 54 Pa. St. 506; Wolf v. Payne, 35 Pa. St. 97; Stotsenberg v. Same, 75 Ind. 538; Scheffermeyer v. Schafer, 97 Ind. 70; Woods v. Cochrane, 38 Ia. 484; De Jarnette v. Verner, 40 Kan. 224.

Digitized by Google

to be sold in violation of the appraisement laws, and acquiesces in such sale by failing to take any steps to vacate, or set it aside, or to prevent its confirmation, is estopped by his acquiescence, and cannot avoid the sale, as against an innocent purchaser not a party to the suit.[53] If property is sold under several writs against the same defendant, under some of which the officer was authorized to proceed without appraisement, the sale will be valid, though no appraisement was made under the other writs.[54]

Appraisement laws which prohibit the sale of property by execution unless a bid is made of a specific part of an appraised value substantially impair the right of a creditor, and make his judgment or contract less valuable, in that they deprive him of all remedy unless a bidder can be found in the amount required, or compel the creditor to become a bidder himself for such amount. If statutes requiring appraisement are repealed, there is no doubt that a sale may be made without appraisement, for the debtor has no vested right to that mode of proceeding. If, however, when a contract is entered into in a state, there is no law in force requiring an appraisement, a statute subsequently enacted prohibiting a sale of property under execution

[53] Merritt v. Borden, 3 Law Gaz. 348; Allen v. Parish, 3 Ohio, 188; Stall v. Macalester, 9 Ohio, 19; Crowell v. Meconkey, 5 Pa. St. 168; Sydnor v. Roberts, 13 Tex. 598, 65 Am. Dec. 84; Daniels v. McBain, 2 Ohio St. 406; Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657. See Wray v. Miller, 20 Pa. St. 111; Williams v. Hickman, 2 Harr. (Del.) 463.

[54] Shirk v. Wilson, 13 Ind. 129; Clark v. Watson, 2 Ind. 399. In Mercer v. Doe, 6 Ind. 80, it was held that the appraisement law of that state, enacted in 1841, did not apply to sales under judgments revived by scire facias. The general rule, however, is to embrace within these laws all compulsory sales, whether made under executions, or under decrees in chancery (Wiles v. Baylor, 1 Ohio, 509), or judgments in rem (Crow v. State, 23 Ark. 684).

Digitized by Google

except for some specified part of the appraised value, cannot be applied to such pre-existing contract.[55]

§ 285. Notifying Defendant of the Sale.—In states where no appraisement is required, the first duty of the officer, after the levy has been made, is to give notice of the sale. In some of the states notice must be given to the defendant, either of the issuing of the execution or of the time and place of the sale.[56] In Massachusetts, in proceedings to enforce mechanics' liens, or for the sale under execution of the right of redeeming mortgaged lands, the statute provides that "the officer shall give notice in writing of the time and place of sale to the debtor, if found within his precinct, thirty days at least before the sale." This statute is mandatory. The notice must be given to the debtor personally, and cannot be served by leaving it at the debtor's last and usual place of abode; and, if attempted to be so served, the sale is void.[57] Elsewhere the rule is dif-

[55] Rawley v. Hooker, 21 Ind. 114; Olmstead v. Kellogg, 47 Ia. 460.

[56] Leeper v. O'Donohue, 18 Tex. Civ. App. 531. Personal notice of the sale must be given to the defendant in Delaware and Tennessee. Wolf v. Heathers, 4 Harr. (Del.) 325. This notice must state the time and place of the sale. Henson v. Henson, 5 Sneed, 322. Leaving it at defendant's residence with some person of discretion is a sufficient service. White v. Chestnut, 11 Humph. 79. But posting on the door of his shop, or giving a copy to a tenant in possession, is not. Richards v. Meeks, 11 Humph. 455, 54 Am. Dec. 49; Lafferty v. Conn, 3 Sneed, 221. The right to object to want of notice may be waived by participating in the sale, and procuring persons to bid. Noe v. Purchapile, 5 Yerg. 215. But is not lost by mere knowledge of or presence at the sale. Carney v. Carney, 10 Yerg. 491. In Tennessee the notice need not be given to a defendant when he is not in possession. Crowder v. Sims, 7 Humph. 259; Christian v. Mynatt, 11 Lea, 615. In Delaware the notice must be given to the tenant on the premises, if the defendant resides in another county. Lewis v. Woodall, 4 Houst. 543.

[57] Parker v. Abbott, 130 Mass. 25. This statute has since been amended (Stat. Mass., 1881, c. 207, § 1), so as to permit the notice to be left at the debtor's last and usual place of abode.

Digitized by Google

ferent. The failure to give to the defendant notice of the levy of a writ, or of the time when his property will be offered for sale thereunder, is a mere irregularity, which he waives if he does not urge it in due time, and this urging must ordinarily be by some attempt to prevent the sale before it takes place, or to vacate it afterward [57a] and before a conveyance to the purchaser.[58]

§ 285 a. Notice of Sale, General Requisites of.—In most of the states the only notice of sale required is one intended for the information of the public. The object of this notice is too obvious to require any detailed description. It is designed to inform the general public of the kind and character of the property to be sold; of the time, place, and terms of the sale; and of the persons whose interests are about to be subjected to an involuntary transfer. Under the general practice, the notices in use usually accomplish all the purposes for which we have said such notices are designed. This fact can hardly be said to result from the statutes upon the subject, for they are usually very vague in their terms, and seem to require the notice to contain nothing but a description of the property, and a specification of the time and place of the sale. This specification, in some statutes, is inferred rather than expressed. A notice not designating the defendants,[59] or naming but one of them, is, therefore, sufficient.[60] In some of the states, however, the names of the plaintiff

[57a] Beam v. City of Brownsville, 91 Tex. 684.

[58] Love v. Powell, 5 Ala. 58; Ray v. Womble, 56 Ala. 32; White v. Farley, 81 Ala. 563; Cowles v. Hardin, 101 N. C. 338, 9 Am. St. Rep. 36; Shaffer v. Bledsoe, 118 N. C. 279.

[59] Perkins v. Spalding, 2 Mich. 157; Chapman v. Morrill, 19 Hun, 318; Jeffries v. Bartlett, 75 Ga. 230; Mainwaring v. Jeneson, 60 Mich. 121, 143.

[60] Harrison v. Cachelin, 35 Mo. 79.

Digitized by Google

and defendant must be stated.[61] In the absence of a statute expressly requiring this statement, there can be no doubt that the failure to state the name of either party or an error in stating it cannot avoid the sale.[62] In New York and California, the notice is not required to state anything except the time and place of the sale, and a description of the property to be sold. It need, therefore, contain no allusion to the parties or the judgment.[63] While it is usual to state the amount of a judgment or decree to satisfy which the sale is to be made, this statement is entirely unnecessary.[64] Under the English chancery practice, when an estate is directed to be sold, the particulars and conditions of the sale are prepared by the solicitor of the plaintiff. "They are intitulated in the cause, and contain a general description of the nature and situation of the property, in whose possession it is or has lately been, and of the manner in which it is proposed to lot the same."[65] After this, the first advertisement of sale is prepared, and an order obtained from the master authorizing its publication. This notice does not name any time for the sale. Afterward the master, upon notice to the parties in interest, fixes the time for the sale. A second notice, usually called the peremptory advertisement, is then prepared, and is published in the gazette and other newspapers. Where chancery sales have not been subjected to any statutory regulation, "the time of advertising, the manner thereof, and the terms of sale are all within the discretion of the court

[61] Jackson v. Spink, 59 Ill. 404; Arnold v. Dinsmore, 3 Cold. 235.
[62] Ganong v. Green, 64 Mich. 488; Horton v. Bassett, 16 R. I. 419.
[63] Cal. Code Civ. Proc., § 692; Chapman v. Morrill, 19 Hun, 318.
[64] Stratton v. Reisdorph, 35 Neb. 314.
[65] 2 Daniell's Ch. Pr., 4th Am. ed., 1269, 1270.

Digitized by Google

granting the decree, and the officer must conform to the decree, whatever it may be." [66]

§ 285 b. Notice of Sale, Describing the Property.— The property ought to be described in the manner best calculated to give notice to the public of its location, extent, character, and value; [67] at all events, the description must be such as to enable a person of common understanding to identify the property offered for sale.[68] In advertising mortgage sales, it has been regarded as sufficient and proper to follow the description of lands contained in the mortgage.[69] In Delaware, it seems to

[66] Gould v. Garrison, 48 Ill. 260; Crosby v. Kiest, 135 Ill. 458.

[67] Collier v. Vason, 12 Ga. 440, 58 Am. Dec. 481; Allen v. Cole, 1 Stock. 286, 59 Am. Dec. 416; Merwin v. Smith, 1 Green Ch. 182; Frazier v. Steenrod, 7 Iowa, 339, 71 Am. Dec. 447. Hence, buildings ought to be described, where they materially enhance the value of the property. In re Wallace, 2 Pitts, 145. The county need not be mentioned where the description is otherwise sufficient to identify the land. Duncan v. Matney, 29 Mo. 368, 77 Am. Dec. 575. Doubtless, a trustee or an officer conducting a judicial sale may be required to exercise greater particularity in describing the property to be sold and the advantages pertaining thereto than is a sheriff conducting an execution sale. Nevertheless, we think the rules prescribed for the former class of officers are worthy of serious consideration. They have been thus stated in a recent opinion: "The object of the advertisement is to inform the public what property is to be sold, to prevent its sacrifice, and to afford the owner an opportunity to redeem it from sale. Kaufman v. Walker, 9 Md. 240. It 'should of itself contain sufficiently definite terms of description, without further reference, to apprise the public of the property to be sold. . . . . The authority by which the property is sold, a description thereof, full enough to be understood by the public, its popular name, if any, its proximity to other known property, the name of the occupant at the time, or any other prominent characteristics, may all or either afford means of informing the public, and others concerned, of the identity of the property.'" Carroll v. Hutton, 88 Md. 682.

[68] Glasscock v. Price (Tex. Civ. App.), 45 S. W. 415.

[69] Beck v. Bank of Smyrna, 5 Houst. 120; Model L. H. Assn. v. Boston, 114 Mass. 133; Robinson v. Mateur Assn., 14 S. C. 148; Miller v. Lanham, 35 Neb. 886.

Digitized by Google

be necessary for the description of the property to include some mention of the improvements thereon, and a sale was set aside because the notice did not mention "a good, large barn," on the lands sold.[70] In Nebraska, where lands were described as "the north half (N. ½) of the southwest quarter (S. E. ¼), section thirty," etc., which were in the southeast quarter, it was held that while "the abbreviated number, in parentheses, was correct, and possibly might have upheld the sale," the court was justified in denying its confirmation.[71] In a notice of sale under a trust deed, the premises to be sold were described as "lot No. 99 in Peter, Beatty, Threlkeld, and Deakin's Addition to Georgetown, fronting 60 feet on Fayette street, and 120 feet on Second street, with a two-story brick dwelling-house in excellent repair." The lot was in Threlkeld's Addition, not in Peter, Beatty, Threlkeld, and Deakin's Addition; and this mistake was claimed to be sufficient to avoid the sale. The court held otherwise, because the reference to the lot as being No. 99, fronting on Fayette and Second streets, clearly showed where it was; and "it cannot be believed that any one wishing to find lot 99, fronting 60 feet on Fayette street, and 120 feet on Second street, or to purchase, could be for one moment misguided by the inaccurate and palpably mistaken description of its being in Peter, Beatty, Threlkeld, and Deakin's Addition." [72] Where one of three notices posted for a sale of standing corn described it as being in the southeast quarter of the northeast quarter of a designated section, instead of in the southeast quarter of the northwest quarter, the mistake was ad-

[70] Oldham v. Hossenger, 5 Houst. 434.
[71] Helmer v. Rehm, 14 Neb. 219.
[72] Newman v. Jackson, 12 Wheat. 570.

Digitized by Google

judged to be immaterial, because "there can be no doubt, under the evidence, that this would have been regarded as a mistaken particular of the description; and that, taking the whole notice together, with the surrounding circumstances, all persons reading the notice would have been apprised with sufficient certainty of the particular piece of corn that was advertised to be sold."[73] The failure to state whether a township is north or south of a designated standard is not material, where the number of the township is given, and the county in which it is situated is stated, and the only township in that county having such a number is north of such standard.[74] A notice of sale may refer to a plat on record, and will be sufficient if a reference to such plat will ascertain the premises intended to be sold.[75] To the description of property in a notice of sale the same rules of interpretation will be applied as if it were used in some other writing, and where there are several elements of description and it is apparent that some of them are false and the others true, and from the true alone there is no difficulty in determining what is intended, the false or repugnant elements will be rejected, and the description thereupon held sufficient.[76]

§ 285c. Notice of Sale, Designating the Time.— The time of the sale should, of course, be stated in the notice with sufficient accuracy to enable intending bid-

[73] Pollard v. King, 63 Ill. 36.

[74] Nebraska etc. I. Co. v. Cutting, 51 Neb. 647.

[75] Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681. In this case, the description was "a lot of land with the buildings and improvements thereon, situate in the northerly part of the city of Providence, being lot of land numbered 10, on the plat of the land of Samuel Whelden, surveyed and platted by H. F. Walling, July 7, 1845." The plat was recorded.

[76] Herrick v. Morrill, 37 Minn. 250, 5 Am. St. Rep. 841.

Digitized by Google

ders to know when to be present. A mistake in naming the day may be so obvious as to permit no reasonable doubt of the time intended. If so, the purpose of the notice is accomplished, and the advertisement is sufficient in this respect.[77] Hence, if in 1896, a notice is published, which purports to fix a date of sale as in 1996, it will not be presumed that any one could have been misled, or have understood otherwise than that the sale was to be in the former year rather than a century later.[78] So, where the law requires all sales to take place between nine o'clock in the forenoon and the setting of the sun, an advertisement of a sale at one o'clock in the forenoon will not mislead any one, for all persons must understand that the sale is not, in violation of law, to take place in the middle of the night, and that, on the other hand, the hour intended is in the afternoon.[79]

As each day consists of twenty-four hours, the majority of which could not be regarded as appropriate for business of this character, a notice is insufficient which merely names the day proposed for the sale.[80] The notice may undertake to name the day of the week as well as of the month, and the two days named may not correspond, as where Friday, the 17th, is designated, when Friday, in fact, falls on the 16th. In that event, doubt would undoubtedly exist in the minds of all readers of the notice, as to whether the sale would

[77] Mowry v. Sanborn, 68 N. Y. 153; Gray v. Shaw, 14 Mo. 341; Chandler v. Cook, 2 McAr. 176; Jensen v. Weinlander, 25 Wis. 477. In this case a notice dated September 15, 1861, stated that the sale would take place on December 6, 1761. See Fenner v. Tucker, 6 R. I. 551.

[78] Long v. Perine, 44 W. Va. 243.

[79] Hewitt v. Durant, 78 Mich. 186.

[80] Trustees v. Snell, 19 Ill. 156, 68 Am. Dec. 586.

Digitized by Google

be held on the 17th or on the Friday preceding that day. Hence, the notice has been treated as ineffectual, because intending bidders "would be deterred by such a blunder."[81] The hour at which the sale is to take place should be stated, or, when that is not done, certain business hours must be mentioned, between which the sale will be made.[82] It would seem that the notice ought to name the very hour at which the sale will commence, so that persons having any inclination to attend will not be deterred from doing so by the fact that they might be kept waiting during all the business hours of the day. The authorities, however, sustain notices which declare that the sale will be made between certain designated hours, provided that both hours are in the business part of the day.[83] It has also been held that if the statute designates the hours between which a sale may be made, they need not be mentioned in the notice of sale.[84]

§ 285 d. Notice of Sale, Designating the Place.— That the notice must inform intending purchasers and others interested in the sale with reasonable certainty where it will be held, is obvious. It would be a vain act to give notice that certain property would, at a time named, be exposed to sale at public auction, and yet leave the public in ignorance of the place where their presence would give them the privilege of bidding at such sale.[85] "The omission of the place of sale

[81] Wellman v. Lawrence, 15 Mass. 326; Thayer v. Roberts, 44 Me. 247; Thacker v. Tracy, 8 Mo. App. 315.

[82] Trustees v. Snell, 19 Ill. 156, 68 Am. Dec. 586.

[83] Coxe v. Halsted, 2 N. J. Eq. 311, "between the hours of twelve and five o'clock in the afternoon"; Burr v. Borden, 61 Ill. 389, "between the hours of nine A. M. and four P. M." Northrop v. Cooper, 23 Kan. 432.

[84] Evans v. Robberson, 92 Mo. 192, 1 Am. St. Rep. 701.

[85] Burnett v. Denniston, 5 Johns. Ch. 35.

Digitized by Google

therefrom entirely destroys the value of the notice; and a sale made pursuant to such defective notice has no greater validity than a sale made without the publication of any notice whatever."[86] The naming in the notice of an impossible or nonexistent place is equivalent to not attempting to name any place.[87] The question of most difficulty in connection with this subject is what degree of precision must be employed in designating a place of sale. We apprehend that the answer must be, that the precise spot need not be pointed out; that the notice will be sufficient if it designates the place with such certainty that any person exhibiting any interest in the matter would have no difficulty in participating in the sale. A notice specifying "the courthouse in the city of St. Paul" as the place of sale was criticised on the ground that there might be many parts and apartments of the courthouse, and no one could know, from the notice, in which of them the sale would be held. But the court held the notice sufficiently definite, in the absence of any evidence of any secrecy and unfairness in the sale, or of any embarrassment experienced by any one in finding where it was being conducted.[88] A notice that a sale of certain mortgaged premises would be held "in the town of St. Joseph" was sustained, it appearing that the town contained only about five hundred inhabitants; that the chief business of the town was limited to two blocks; that the sale was made on the mortgaged premises, adjacent to these blocks, and was well attended.[89] A notice declaring that a sale would take place "at the

[86] Blodgett v. Hitt, 29 Wis. 179.
[87] Bottineau v. Aetna Life Ins. Co., 31 Minn. 125.
[88] Golcher v. Brisbin, 20 Minn. 453.
[89] Beatie v. Butler, 21 Mo. 313, 64 Am. Dec. 234.

Digitized by Google

courthouse door in the town of Hillsboro" (without naming the county) is sufficient if it describes the lands and states the county in which they are situate, Hillsboro being in fact the county seat of such county.[90] If by common usage the rotunda of the city hall proper is established as the place for foreclosure sales, a notice that such a sale would be held "at the city hall in the city of New York" is sufficiently definite with respect to place.[91] If a mortgage provides that any sale made thereunder shall be "at the north door of the courthouse in the city of Chicago," the destruction of such courthouse by fire will justify the holding of such sale at the door of another building, for the time being used as the courthouse.[92] From a notice describing several parcels of real property situate in several towns, and stating that as to those in each town the sale will be made at an hour named on the premises, it is inferable that each parcel will be sold at some place thereon, and, hence, the notice sufficiently designates the place of sale of each.[93]

§ 285 e. Publication of Notice of Sale.—In the case of personal property, the notice is usually required to be posted in a specified number of public places. When real estate is to be sold, a similar posting is made, and the notice is published for a stated period in some newspaper.[94] If this newspaper is published on Sunday, the insertion of the notice therein is a nullify, because "it would be a perversion of all principle to

[90] Powers v. Kueckhoff, 41 Mo. 425, 97 Am. Dec. 281.
[91] Hornby v. Cramer, 12 How. Pr. 490.
[92] Waller v. Arnold, 71 Ill. 350; Wilhelm v. Schmidt, 84 Ill. 183.
[93] Sowles v. Witters, 55 Fed. Rep. 159.
[94] An advertising sheet is not a newspaper. Tyler v. Bowen, 1 Pittsb. Rep. 225; Kratz's Appeal, 21 Leg. Int. 4.

Digitized by Google

permit a sheriff to aid in the violation of a statute by employing the violator to publish legal notices; for we should then have the singular anomaly of the chief ministerial officer of the county encouraging the violation of a law which it is his sworn duty to enforce.[95]

Notice of sales under two or more writs may be embraced in the same advertisement.[96]

Where the law requires notice to be given for two or more successive weeks, a difference of opinion has arisen whether seven days must be given as a week's notice. Thus, in Illinois, where a statute provided notice to be given for three weeks, an advertisement published in three different weeks, but for a less period than twenty-one days, was sustained.[97] Similar decisions have been made in other states.[98] A majority

[95] Shaw v. Williams, 87 Ind. 158, 44 Am. Rep. 756; Smith v. Wilcox, 24 N. Y. 353, 82 Am. Dec. 302; Scammon v. City of Chicago, 40 Ill. 146.

[96] Where an officer has several writs in his hands, it is his duty to include all in one advertisement and sale. This rule has been applied even where some of the writs authorized a cash, and others a credit, sale. Southard v. Pope, 9 T. B. Mon. 263; Locke v. Coleman, 4 T. B. Mon. 315. In Indiana, where some of the writs authorized a sale without the benefit of appraisement, and others did not so authorize, the court held the officer ought to sell separately, first proceeding under the the senior writ. Harrison v. Stipp, 8 Blackf. 455. An officer, having advertised under one execution, is not authorized to sell under that and others. Mascraft v. Van Antwerp, 3 Cow. 334; Brewster v. Cropsey, 4 How. Pr. 220; Husted v. Dakin, 17 Abb. Pr. 150.

[97] Pearson v. Bradly, 48 Ill. 250.

[98] Morrow v. Weed, 4 Iowa, 77, 66 Am. Dec. 122; Garrett v. Moss, 20 Ill. 554; Williams v. Moore, 1 T. & H. Pr. 996; Olcott v. Robinson, 21 N. Y. 150; Wood v. Moorehouse, 45 N. Y. 369. This question recently arose in Pennsylvania, and, in determining it, the court said: "The further objection is made to the advertisement of the sale that it was not made three full weeks before the day fixed for the sale. The language of the act of June 16, 1836, § 63, Pub. Laws, 772, is, that the officer making the sale shall give notice by advertisement 'once a week during three successive weeks.' Does this

Digitized by Google

of the cases upon this subject sustains a contrary view, and shows that the statute requiring notice for three weeks cannot be satisfied by a publication for less than twenty-one days.[99] By publication for twenty-one days, we mean that at least twenty-one days must intervene between the first publication of the notice and the day of the sale. In South Carolina, it has been decided that, in counting time, the first day of the publication and the day of the sale may both be included, upon the principle that a day may be excluded or

require that the first notice shall be three full weeks, or twenty-one days, before the day of sale? It does not appear that this point has ever been expressly decided by this court, and the decisions of the courts of common pleas are not uniform upon it. The general practice, however, has been against such requirement, and to regard the statute as referring to calendar weeks, or specified periods of time, and an advertisement in each of three successive periods of this kind, although the advertisements may not have been all on the same day of the week, and there may not have been twenty-one full days between the first and the date of the sale. This is the rule laid down in 1 Troubat and Haley's Practice in Civil Actions, § 1250, and has been recognized by this court, inferentially, at least, in the case of In re North Whitehall Township, 47 Pa. St. 156, where a notice directed to be given 'three weeks before the time of meeting' was held to mean twenty-one full days, and was expressly distinguished by Strong, J., from a notice 'during three successive weeks,' or one for 'a given number of insertions in successive weeks.' Many hundreds of titles have been made under this view of the law, and it would require a very clear case of error to justify us in throwing a doubt upon them by a contrary construction. No such showing has been made. This objection cannot be sustained." Hollister v. Vanderlin, 156 Pa. St. 248, 44 Am. St. Rep. 657.

[99] Boyd v. McFarlin, 58 Ga. 208; Meredith v. Chancey, 59 Ind. 405; Bacon v. Kennedy, 56 Mich. 329; Smith v. Rowles, 85 Ind. 264; Francis v. Norris, 2 Miles, 150; In re Wallace, 2 Pittsb. Rep. 145; Olcott v. Robinson, 20 Barb. 148, reversed in 21 N. Y. 150, 78 Am. Dec. 126; In re North Whitehall Township, 47 Pa. St. 156; Early v. Doe, 16 How. 610; Wallace's Estate, 7 Pitts. L. J. 401. In Kansas, the publication of the notice of sale must commence thirty days before the sale, and be inserted in each issue of the paper in which it is made. McCurdy v. Baker, 11 Kan. 111; Whitaker v. Beach, 12 Kan. 492.

Digitized by Google

included, as may be necessary, in order to support a deed.[100] In other states, the computation is made by including the day on which the notice was first published and excluding the day of sale. Hence, if one week's publication of the notice is required, the publication may begin on the first day of the month and the sale take place on the eighth.[101] In Rhode Island the statute provides that, upon the levy of an execution on real estate, the officer shall set up a notification of such levy for the space of three months after the levy and before the realty is exposed for sale. In computing this time, it is held that both the day of the levy and the day of the sale must be excluded, and, hence, that if the levy is on September 5th, a sale cannot be made on December 5th of the same year, because the purpose of the statute is to provide a notice of three full calendar months between the levy and the sale.[102]

Frequently doubt arises whether the paper in which a notice was published is "a newspaper" or a "public newspaper" within the meaning of the statute controlling the question. Thus, in Illinois, it was insisted that the publication known as the "Chicago Legal News" was not a newspaper, because it was devoted principally to the "dissemination of legal intelligence, though it made brief reference to passing events and personal and political items of interest to the general reader as well as to the legal profession." It was held that this paper came substantially, at least, within the definition given by lexicographers of a newspaper.[103] A similar

[100] Manning v. Dove, 10 Rich. 395; Williamson v. Farrow, 1 Bail. 611, 21 Am. Dec. 492.

[101] Worley v. Naylor, 6 Minn. 192; Hagerman v. Ohio B. & S. Assn., 25 Ohio St. 186.

[102] Goldsworthy v. Coyle, 19 R. I. 823.

[103] Kerr v. Hitt, 75 Ill. 51.

Digitized by Google

decision was made in the same state respecting the "Chicago Daily Law Bulletin" on proof that it was a secular newspaper of general circulation throughout the state among judges, lawyers, real estate dealers, brokers, merchants, and business men generally, and that "while its columns are devoted largely to legal matters and court notices, yet it contained varied advertising matters, confined to no trade or calling, and that there is published in it also news and information of a general, secular character." [104] Substantially the same question was presented subsequently in the same state under statutes requiring publications to be made "in a public newspaper printed and published in the county of the proposed sale," and publications were made in "The National Corporation Reporter," [105] and in the "Chicago Law Journal Weekly," there being evidence, as to the latter paper, that it was published weekly, circulated among lawyers and laymen, contained reports of the decisions of the courts and also news of a general nature of current events, and had an average weekly circulation of thirty-eight hundred and seventy-five copies.[106] There are, doubtless, publications so exclusively devoted to the information or interest of a limited class of the community that they cannot, however considerable their circulation, be regarded as newspapers within the meaning of the law relating to public advertisements.[107] The generally accepted definition of a newspaper, however, is, that it is "a publication, usually in sheet form, intended for general circulation, and published at short intervals,

[104] Railton v. Lander, 126 Ill. 219.
[105] Maass v. Hess, 140 Ill. 576.
[106] Pentzel v. Squire, 161 Ill. 346, 52 Am. St. Rep. 373.
[107] Beecher v. Stephens, 25 Minn. 146.

Digitized by Google

containing intelligence of current events and news of general interest," and that "if a publication contains the general and current news of the day, it is none the less a newspaper because it is chiefly devoted to the dissemination of intelligence of a particular kind or to the advocacy of particular principles or views. Most newspapers are devoted largely to special interests, political, religious, financial, moral, social, and the like, and each is naturally patronized mainly by those who are in accord with the views which it advocates, or who are most interested in the kind of intelligence to which it gives special prominence, but if it gives the general, current news of the day, it still comes within the definition of a newspaper."[108] It is manifest under the liberal definitions given that the selection of one, rather than another, of the different papers, all falling within the general description of a newspaper, may be a matter of very considerable importance. The sheriff has the power to make this selection. While, in a general sense, in making it, he acts as an agent of the plaintiff, he is not subject to the latter's control, and there is no means by which he is compelled to make a choice agreeable to the plaintiff's views.[109]

Sometimes what is substantially the same newspaper is circulated in different localities under different names or headings, and then the question may arise, in which of these localities is it to be deemed published, where the statute requires notice to be inserted in a newspaper published in the city or town wherein the premises to be sold are situated. In a case involving this question it appeared that a newspaper called the "Dighton Rock"

[108] Hull v. King, 38 Minn. 349; Hernandez v. Drake, 81 Ill. 34; Kellogg v. Carrico, 47 Mo. 157; Benkendorf v. Vincenz, 52 Mo. 441.
[109] Winton v. Wilson, 44 Kan. 146.

Digitized by Google

had the same contents as a newspaper called the "Fall River Advertiser," but with a different heading and date line, and that it was printed in Fall River, and a few copies thereof sent to Dighton to general subscribers for sale and distribution. It was held that this newspaper was sufficiently published in Fall River to warrant the insertion therein of an advertisement of a sale of property situate in that town.[110]

§ 286. The Effect of Sales Where the Notice is not Properly Given.—An objection to the form of a notice can only be made by the defendant, and cannot be successfully urged by him, unless he proceeds to take advantage of it without any unnecessary delay.[111] The notice of the sale, being for the benefit of the defendant, may be waived by him.[112] There may, however, be instances in which his creditors are prejudiced by the waiver, and in which they may, probably by proceeding in some appropriate method, avoid or vacate the sale.[113] If the defendant, being the owner of the only newspaper in the county, refuses to permit the publication in it of a notice of the sale of his property, the sheriff may give notice by handbills, and the defendant is estopped from urging that publication of no-

[110] Rose v. Fall River etc. Bank, 165 Mass. 273.

[111] McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Swiggart v. Harber, 4 Scam. 364, 39 Am. Dec. 418; Rigg v. Cook, 4 Gilm. 336, 46 Am. Dec. 462; Phillips v. Coffee, 17 Ill. 157, 63 Am. Dec. 357.

[112] Greer v. Wintersmith, 85 Ky. 576, 7 Am. St. Rep. 613; Hilliard v. Wilson, 76 Tex. 180; Shamburger v. Kennedy, 1 Dev. 1; Burroughs v. Wright, 16 Vt. 619; Mungor v. Fletcher, 2 Vt. 524. Notice of sale is waived by knowingly accepting a part of the proceeds of such sale. Huffman v. Gaines, 47 Ark. 226.

[113] Succession of Hiligsberg, 1 La. Ann. 340; Gibbs v. Neely, 7 Watts, 305. In Louisiana, if dotal property is to be sold under execution, the notice of the sale is indispensable to divest the title of the wife. It cannot be waived. Esneault v. Cooley, 16 La. Ann. 165.

Digitized by Google

tice of the sale was not made as required by statute.[114] No doubt the proper method, in nearly all the states, of taking advantage of an insufficient notice, or of the absence of all notice, is by some motion or proceeding to prevent or to vacate the sale. In California a sale will not be set aside because the sheriff gave no notice.[115] The remedy of the defendant is by action against the officer to recover such damages as he may have sustained, the statute of that state having declared that an officer "selling without the required notice shall forfeit five hundred dollars to an aggrieved party in addition to his actual damages."[116] In other states the rule is different from that established in California, and sales are vacated or refused confirmation where proper notice has not been given.[117] But where no notice to prevent or vacate the sale is interposed, the question must be determined whether the want of notice will affect the validity of the sale in collateral proceedings. In Tennessee the statute concerning sales under execution declares that sales made without complying with its provisions shall be void. Under this statute, the neglect to give personal notice to the defendant, or the neglect to give sufficient public notice of the sale, must necessarily render it void.[118] Absence of or defects in a notice of sale may justly be

[114] Walton v. Harris, 73 Mo. 489.

[115] Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475.

[116] Shores v. Scott R. W. Co., 17 Cal. 626.

[117] Wheatley v. Terry, 6 Kan. 427; Mechanics' Bank v. Pitt, 44 Mo. 364; Kellogg v. Howell, 62 Barb. 280; Wells v. Pfeiffer, 4 Yeates, 203; Burton v. Wolfe, 4 Harr. (Del.) 221; Ray v. Stobbs, 28 Mo. 35; Bailey v. Bailey, 9 Rich. Eq. 392; Glenn v. Wootten, 8 Md. Ch. 514; Helmer v. Rehm, 14 Neb. 219; Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753; Morris v. Hastings, 70 Tex. 26, 8 Am. St. Rep. 570.

[118] Lafferty v. Conn, 3 Sneed, 221; Loyd v. Anglin, 7 Yerg. 428; Trott v. McGavock, 1 Yerg. 469; Prater v. McDonough, 7 Lea, 670.

Digitized by Google

given a different effect in execution than in judicial sales. The latter take place under the authority and supervision of the court; the sale itself is conditional upon the subsequent approval of the court; the proceedings, including those taken to give notice of the sale, are reported to the court, where they may be inspected by all persons, whether interested in the property or not; and finally, any person interested may resist the confirmation on account of any irregularity in the notice of the sale. The order of confirmation is always in effect, and often in terms, an adjudication that the sale has been properly and fairly conducted, and is free from any material irregularity. Therefore, we should expect the tendency to regard the want of a proper notice as not fatal to the sale, when urged collaterally, to be stronger in the case of judicial than in that of execution sales. Precisely the converse of this is true. In several of the states, judicial sales have been treated as invalid because not supported by a proper notice,[119] while in others the more reasonable rule is maintained that the existence and sufficiency of the notice are legitimate subjects of inquiry when the sale is reported for confirmation, but not afterward.[120] Concerning execution sales, on the other hand, and in the absence of any statute establishing a rule upon the subject, there

[119] Thomas v. Le Baron, 88 Met. 363; Curley's Succession, 18 La. Ann. 728; Blodgett v. Hitt, 29 Wis. 169; Montour v. Purdy, 11 Minn. 384; Gernon v. Bestick, 15 La. Ann. 697; Hobart v. Upton, 2 Saw. C. C. 302; Mercantile T. Co. v. South Park R. Co., 94 Ky. 271; Hutson v. Sadler, 31 W. Va. 358.

[120] Morrow v. Weed, 7 Iowa, 77, 66 Am. Dec. 122; Woodhull v. Little, 102 N. Y. 165; Little v. Sinnett, 7 Iowa, 324; Minor v. Selectman, 4 Smedes & M. 602; Files v. Harrison, 29 Ark. 307; Bland v. Muncaster, 24 Miss. 62, 57 Am. Dec. 162; Hanks v. Neal, 44 Miss. 212; McNair v. Hunt, 5 Mo. 301; Cooley v. Wilson, 42 Iowa, 428; Hudgens v. Jackson, 51 Ala. 514; Moffitt v. Moffitt, 69 Ill. 641.

Digitized by Google

are some dicta[121] and a few decisions[122] indicating that the existence of a notice of sale is essential to its validity. But a very decided preponderance of the authorities maintains this proposition: that the statutes requiring notice of the sale to be given are directory merely,and that the failure to give such notice cannot avoid the sale against any purchaser not himself in fault.[123] This rule has been applied in cases where the purchaser was aware of the deficiency of the notice,[124] and seems to be applicable in all cases in which the absence of the notice was not occasioned by some fraud or collusion of which the purchaser had knowledge, or in which he participated.[125] In New York

[121] Hughes v. Watt, 26 Ark. 228; Collins v. Smith, 57 Wis. 284.

[122] Henderson v. Hays, 41 N. J. L. 387.

[123] Rounsaville v. Hazen, 33 Kan. 71; Frink v. Roe, 70 Cal. 302; Huffman v. Gaines, 47 Ark. 226; Steward v. Pettigrew, 28 Ark. 372; Dula v. Seagle, 98 N. C. 458; Mitchell v. Nodaway County, 80 Mo. 257; Ware v. Bradford, 2 Ala. 676, 36 Am. Dec. 427; Hendrickson v. St. Louis etc. R. R. Co., 34 Mo. 188, 84 Am. Dec. 76; Brooks v. Rooney, 11 Ga. 423, 56 Am. Dec. 430; Hobein v. Murphy, 20 Mo. 447, 64 Am. Dec. 194; Lawrence v. Speed, 2 Bibb, 401; Wright v. Spencer, 1 Stew. 576, 18 Am. Dec. 76; Kilby v. Haggin, 3 J. J. Marsh. 208; Whittaker v. Sumner, 7 Pick. 551; Osgood v. Blackmore, 59 Ill. 261; McEntire v. Durham, 7 Ired. 151, 45 Am. Dec. 512; Armstrong v. Jackson, 1 Blackf. 210, 12 Am. Dec. 225; Maddox v. Sullivan, 2 Rich. Eq. 4, 44 Am. Dec. 234; Lenox v. Clark, 52 Mo. 115; Natchez v. Minor, 10 Smedes & M. 246; Curd v. Lackland, 49 Mo. 451; Draper v. Bryson, 17 Mo. 71, 57 Am. Dec. 257; Minor v. Natchez, 4 Smedes & M. 602, 43 Am. Dec. 488; Wallace v. The Trustees, 52 Ga. 164; Hanks v. Neal, 44 Miss. 212; Wade v. Saunders, 70 N. C. 270; Meanor v. Hamilton, 27 Pa. St. 137; Thulemeyer v. Jones, 37 Tex. 560; Osborne v. Kerr, 17 U. C. Q. B. 134; Lee v. Howes, 30 U. C. Q. B. 292; Jackson v. Spink, 59 Ill. 404; 4 Ch. L. N. 309; Pollard v. King, 63 Ill. 36; Evans v. Robberson, 92 Mo. 92, 1 Am. St. Rep. 701; Dula v. Seagle, 98 N. C. 458; Morris v. Hastings, 70 Tex. 26, 8 Am. St. Rep. 570.

[124] Hendrick v. Davis, 27 Ga. 167, 73 Am. Dec. 726; Johnson v. Reese, 28 Ga. 353; Harvey v. Fisk, 9 Cal. 93.

[125] Draper v. Bryson, 17 Mo. 71, 57 Am. Dec. 257; Lawrence v. Speed, 2 Bibb, 401; Weber v. Cox, 6 B. Mon. 110, 17 Am. Dec. 127;

Digitized by Google

the absence of notice does not defeat a sale at which the plaintiff is the purchaser.[126] The recital in the deed to that effect is prima facie evidence that a notice

Brooks v. Rooney, 11 Ga. 423, 56 Am. Dec. 430; White v. Cronkhite, 35 Ind. 483.

[126] Wood v. Morehouse, 45 N. Y. 368; 1 Lans. 405. The rule was said to be otherwise as to the plaintiff in Collins v. Smith, 57 Wis. 284, and in Dula v. Seagle, 98 N. C. 458; but in the Wisconsin case the question arose on a motion to vacate the judgment, and in the North Carolina case it did not arise at all. When this question was presented to the court of civil appeals of Texas, it said, after referring to various decisions: "These and other authorities announce the rule, that a valid judgment and execution confer upon the sheriff the power to make a sale, and when he has made a levy and sold the property at the time and place required by statute, the fact that he may not have given the prescribed notice will not render the sale void. That fact, in connection with others, may render it voidable, and in a proper proceeding it may be set aside; but such a sale is not absolutely null and void. Learned counsel for appellant contends, that while this may be the correct rule when a stranger is the purchaser, a distinction should be made and the sale declared null and void even in a collateral proceeding, when, as in this case, the judgment creditor becomes the purchaser for a grossly inadequate consideration. This argument is based upon the assumption that a sheriff's sale not properly advertised confers no title, unless the vendee be an innocent purchaser for value, without notice that the sale has not been duly advertised; and that the rule to which we have adverted is for the protection of such innocent purchasers, and upon this assumption a very plausible argument is made. The fallacy of the argument lies in its premises. In order to render a sheriff's sale absolutely void, so as to subject it to attack, in a collateral proceeding, it must appear that the sheriff had no power or authority to act. If the law had conferred upon him authority to make the sale at the time and place made, although, on account of irregularities, or for other reasons, the sale may be voidable, it is not absolutely void. The authorities cited, we think, settle the proposition, that the statute requiring the sheriff to advertise the sale in a particular manner is not mandatory in the sense that, unless complied with, he will have no power to sell, and, therefore, noncompliance with the statute in that respect constitutes a mere irregularity, not absolutely fatal to the authority of the sheriff to sell. It follows, therefore, that, whoever may be the purchaser, his relation to the execution under which the sale is made, his knowledge or lack of knowledge concerning the notice given by the

Digitized by Google

was given.[127] If not shown by the deed or return, the notice may be proved by parol.[128] Doubtless an officer who omits to advertise property for sale as required by law may be liable to recompense either party for any damage resulting from this neglect of duty.[129] Apparently, however, the consequences to the officer may be more serious than this. It is a general rule of law that, though an officer proceeds in exact conformity to the law and to the commands of his process, he may, by his subsequent unjustifiable misconduct, deprive himself of the protection of his process, and entitle any party injured by such misconduct to pursue him as a trespasser ab initio.[130] So far as the courts have spoken upon this subject, they have held that the selling of property under execution by an officer without previously giving the notice of sale required by the statute is such misconduct that the officer is no longer entitled to the protection of his writ. The result of this must be that, if sued in trespass, his defense cannot rest upon the process, nor can it be used in diminution of damages.[131]

sheriff, or the amount paid by him for the property, can have no bearing whatever in determining whether or not the sale is absolutely void. That fact is determined by the conditions existing at the time the sale begins, and is in no wise dependent upon anything that occurs pending or subsequent to the sale." Moore v. Johnson, 12 Tex. Civ. App. 694.

127 Simmons v. McKissick, 6 Humph. 259.

128 Doe v. Lane, 3 Smedes & M. 763. Penalties are imposed by statute in many of the states against any person who shall take down or deface notices of sale. Murphy v. Tripp, 44 Barb. 189.

129 Freeman v. Leonard, 99 N. C. 274.

130 Boston etc. R. R. v. Small, 85 Me. 462, 35 Am. St. Rep. 379; State v. Devitt, 107 Mo. 573, 28 Am. St. Rep. 440.

131 Post, § 302; Sawyer v. Wilson, 61 Me. 529; Smith v. Gates, 21 Pick. 55; Wienskawski v. Wisner, 114 Mich. 271; Carrier v. Esbaugh, 70 Pa. St. 239; Kerr v. Sharp, 14 S. & R. 399; Bowman v. Knott, 8 S. D. 330; Sutton v. Beach, 2 Vt. 42.

Digitized by Google

§ 287. **Of the Time for the Sale.**—The time chosen for a sale must not be on Sunday. It may be on a non-judicial day, for it is not a judicial act.[132] The hour selected should not be earlier than nine o'clock in the morning, nor later than sunset. If the sale cannot be completed by sunset, it should be adjourned to the next day by proclamation, made in the presence of the persons in attendance.[133] We have already seen that the statutes directing notice of sale to be given are directory merely, and that the absence of notice does not render a sale void.[134] A sale on a day different from that specified in the notice is, in legal effect, a sale without notice, and ought in all respects to be treated as such. The officer making such a sale, and afterward discovering his error, will not be compelled to receive the purchase money and make the conveyance.[135] In those states in which a sale is regarded as void if not preceded by any notice, it must be equally void when, though a notice is given, the sale takes place at some other time so that the notice could not have accomplished its object.[136] A sale advertised for an hour specified, as at eleven o'clock A. M., may properly be made at that time or at any time within one hour thereafter. In other words, "it is eleven o'clock until twelve o'clock."[137] A sale on the wrong day may be vacated.[138] The defendant's right to move for such vacation is not waived by his presence at the sale

[132] King v. Platt, 37 N. Y. 155; Crabtree v. Whiteselle, 65 Tex. 111; McKennon v. McGown (Tex.), 11 S. W. 582.

[133] Crocker on Sheriffs, § 468.

[134] § 286.

[135] State v. Byrd, 42 Ga. 629.

[136] Wienskawski v. Wisner, 114 Mich. 271; Wortham v. Basket, 99 N. C. 70.

[137] McGovern v. Union M. L. Ins. Co., 109 Ill. 151.

[138] McConnell v. Gibson, 12 Ill. 128; Wheatley v. Terry, 6 Kan. 427.

Digitized by Google

and his failing then to interpose any objection.[139] A sale for taxes on a day not named in the notice is void.[140] In New York, a sale after sunset was held void.[141] This is because a statute of that state fixes the hours between which execution sales may be made, and thereby prohibits them after sunset. In the absence of a statute upon the subject, it is evident that, as the object is to give publicity to execution sales and thereby invite bidding and prevent the sacrifice of property, the officer should select such an hour of the day as will be likely to encourage competition and realize the best price, and the selection of a late hour at night may, in connection with other circumstances, induce the court to declare the sale unfair, and, in extreme instances, void.[142] In Illinois, a sale at four o'clock in the morning was adjudged to be voidable only, and to be capable of becoming unobjectionable through the defendant's acquiescence.[143] This rule certainly ought to be recognized and enforced in all sales made at an improper time,[144] but not tainted with fraud. If an agreement is made to the effect that a sale shall not take place at the time fixed in the notice thereof, but the officer, in ignorance of the agreement, proceeds with the sale, it must be deemed valid in favor of a purchaser without notice.[145]

[139] Humphreys v. Browne, 19 La. Ann. 158.

[140] Conrad v. Darden, 4 Yerg. 307.

[141] Carnrick v. Myers, 14 Barb. 9. In Texas, a sale at a time or place other than that prescribed by law is void. Doxey v. Burns, 37 Tex. 719; Grace v. Garnett, 38 Tex. 156.

[142] McNaughton v. McLean, 73 Mich. 250.

[143] Rigney v. Small, 60 Ill. 416.

[144] Jackson v. Spink, 59 Ill. 404; Botsford v. O'Connor, 57 Ill. 72; Doe v. Woodson, 1 Hayw. 24. But King v. Cushman, 41 Ill. 31, 89 Am. Dec. 366, determined that the sale, if to plaintiff or to a purchaser with notice, passed no title.

[145] Knox v. Yow, 91 Ga. 367.

Digitized by Google

A distinction may properly be made between a sale not made on the day specified in the notice, or made at an improper hour of such day, and a sale made on a day on which, under the law, no sale can properly be made. In the latter class of cases, as all persons must take notice of the law, both the original purchaser and all persons deraigning title from him are presumed to know that the sale occurred without the authority of law. Such sales have generally been adjudged void,[146] unless reported to and confirmed by the court.[147] It is always essential that a sale be made under a valid, subsisting authority. A sale made when such authority has been destroyed by lapse of time will everywhere be treated as void. If the statute under which a license to sell is granted limits the operation of the license within a designated period, a sale after the expiration of that period is a nullity.[148] In Connecticut a statute provided that execution sales of personal property should be made at the end of twenty-one days after the notice of the sale was posted. A sale one day later was adjudged void on the ground that the statute clearly prohibited a sale at that time, and that the officer's authority had absolutely terminated, and all intending purchasers were chargeable with notice of such termination.[149]

If the statute under which an order of sale has been granted is repealed, or the court in which it was en-

[146] Mayers v. Carter, 87 N. C. 146; State v. Rives, 5 Ired. 297; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Lowdermilk v. Corpening, 101 N. C. 649.

[147] Brown v. Christie, 27 Tex. 75.

[148] Macy v. Raymond, 9 Pick. 285; Marr v. Boothby, 19 Me. 150; Mason v. Ham, 36 Me. 573; Williamson v. Williamson, 52 Miss. 725. A sale fifteen years after the granting of the license to sell was held invalid, in the absence of any expressed statutory limit of its operation. Wellman v. Lawrence, 15 Mass. 326.

[149] Morey v. Hoyt, 65 Conn. 516.

Digitized by Google

tered is abolished, its legal vitality is destroyed, and it cannot support a subsequent sale.[150]

The right to make a sale may be suspended or destroyed by the property levied upon coming into the possession of a receiver acting under authority of a court of competent jurisdiction. Though such court will respect all prior liens, it will not suffer them to be enforced nor the property taken from the possession of its officer without its permission. Hence, an execution sale of property in the possession of a receiver, though such property was subject to a writ levied before this appointment, has been pronounced void.[151]

§ 288. The Power to Adjourn a Sale.—The officer charged with the execution of the writ, while he must not unnecessarily imperil the rights of the plaintiff, ought always to seek to avoid the sacrifice of the property of the defendant. To prevent such a sacrifice, the officer is invested with a very large discretion. In the exercise of this discretion, he may and ought, even against the protest of the plaintiff, to adjourn the sale, or return that the property is unsold for want of bidders, whenever he sees that his proceeding with the sale is likely to operate as a sacrifice of the property in excess of that usually attendant on forced sales of like property.[152] He is not, however, under any duty,

[150] McLaughlin v. Janney, 6 Gratt. 609; Perry v. Clarkson, 16 Ohio, 571; Bank v. Dudley, 2 Pet. 493.

[151] Walling v. Miller, 108 N. Y. 173, 2 Am. St. Rep. 400.

[152] Reynolds v. Nye, 1 Freem. Ch. 462; McDonald v. Neilson, 2 Cow. 139; Hawley v. Cramer, 4 Cow. 717; United States v. Drennen, 1 Hemp. 320; Jewett v. Guyer, 38 Vt. 209; Swortzell v. Martin, 16 Iowa, 519; Tinkom v. Purdy, 5 Johns. 345; Warren v. Leland, 9 Mass. 264; Conway v. Nolte, 11 Mo. 74; Aldrich v. Wilcox, 10 R. I. 405; Lantz v. Worthington, 4 Pa. St. 153, 45 Am. Dec. 682; Strong v. Catton, 1 Wis. 471; Den v. Zellers, 2 Halst. 153; Perkins v. Proud, 62 Barb. 420; Phelps v. Conover, 25 Ill. 309; Blossom v. R. R. Co.,

Digitized by Google

at the suggestion of a third person who does not appear to be a party to the litigation, to continue a sale on the ground that it is to take place on Saturday, and such person is of a religious faith which does not permit his doing business on that day.[153]

At the common law, it seems not to have been the duty or even the privilege of the officer to delay the sale out of consideration for the interests of the defendant, and their sacrifice seems to have been unavoidable, provided they sold for sufficient to satisfy the writ. If, however, the officer "could not find purchasers for the goods levied, or for enough of them to satisfy the debt and costs, his duty was to return the fact upon his process; and if a venditioni exponas was issued to him, he might make the same return to that, since, if the plaintiff in execution was dissatisfied with the return, he might set up a purchaser of the goods himself. If the goods were sold at auction, it was his duty, however, not to allow them to be sacrificed for want of bidders; and if a small sum, in comparison with their value, was bid for them, he was to keep them, and return that he did so for want of buyers, and wait for a venditioni exponas, which in such a case was construed to mean, 'Sell for the best price you can obtain.'" [154]

The general practice in Rhode Island was thus described: "The practice has been, with officers charged with executions, for good cause, to adjourn sales of property, real or personal, levied upon by them, duly advertising the change of the time of sale, that there may not be a failure for want of buyers. Such power of ad-

3 Wall. 196; Kelly v. Creen, 63 Pa. St. 299; Collier v. Whipple, 13 Wend. 229.

[153] Pewabic M. Co. v. Mason, 145 U. S. 349.

[154] Reynolds v. Hoxsie, 6 R. I. 466; Leader v. Danvers, 1 Bos. & P. 359; Keightley v. Birch, 3 Camp. 521.

Digitized by Google

journment was always deemed incidental to the power to sell, the whole of which was intrusted by the execution, under the law, to the officer. No other order was ever issued to him than the execution, a venditioni exponas being wholly unknown in the simplicity of our practice. Within the limits of the law the officer exercised his discretion with regard to the time of the sale; and, as no positive prohibition of the necessary power of adjournment existed on the statute-book, adjourned the sale from time to time as the exigencies of the case required. If he could not, from storms or accidents, reach the place of sale; if, reaching it, from want of buyers, he could not sell, or could not sell except at a great sacrifice—in fine, if from any cause consistently with the performance of his general duty under the execution the sale could not take place at the time originally appointed, he appointed another time at which it might. Nor was this practice peculiar to ourselves; but in other states this same incidental power was not only possessed, but in proper cases required to be exercised, by sheriffs charged with sales upon execution as part of their duty." [155]

Officers charged with the duty of conducting chancery, trustee, and other involuntary sales have also a discretion to withdraw property after being offered for sale, and to adjourn the sale from time to time, as may be necessary to prevent an undue sacrifice of the property.[156] The sale may be adjourned to a different

[155] Reynolds v. Hoxsie, 6 R. I. 467; Wade v. Saunders, 70 N. C. 279; Russell v. Richards, 11 Me. 371, 26 Am. Dec. 532; Aldrich v. Grimes, 14 R. I. 219.

[156] Miller v. Law, 10 Rich. Eq. 320; Blossom v. R. R. Co., 3 Wall. 196; Kelley v. Israel, 11 Paige, 152; Richards v. Holmes, 18 How. 143; Hosmer v. Sargent, 8 Allen, 97, 85 Am. Dec. 683; Dexter v. Shepard, 117 Mass. 480.

Digitized by Google

place, provided it is such a place as might lawfully have been selected for the sale in the first instance.[157] The discretion vested in the officer to adjourn the sale cannot be delegated by him to one of the parties, nor to the attorney of such party.[158] A contract to exercise this official discretion in any particular manner is against public policy, and is utterly void. Neither party has the right to rely on an agreement made by the officer to adjourn the sale.[159]

While the power of officers to adjourn sales is undisputed, the courts have not agreed on the character of the notice which must be given of the time to which the adjournment is made. On the one side, it is insisted that a new notice must be given, for the time and in the manner required in the first instance.[160] On the other side, the rule is maintained that the officer may give notice by proclamation, made in the presence and hearing of the persons assembled at the time first fixed for the sale.[161] Besides making this proclamation, the officer usually affixes to the posted notices the statement that the sale has been adjourned to a time designated. The decisions respecting the notice to be given of the adjournment of an execution sale are still inadequate to finally and clearly settle the question. We think, how-

[157] Richards v. Holmes, 18 How. 143; Tinkom v. Purdy, 5 Johns. 345; Jewett v. Guyer, 38 Vt. 209.

[158] Wolf v. Van Metre, 27 Iowa, 348.

[159] Perkins v. Proud, 62 Barb. 420; Goodale v. Holridge, 2 Johns. 193.

[160] Enloe v. Miles, 12 Smedes & M. 147; Thornton v. Boyden, 31 Ill. 200; Montgomery v. Barrow, 19 La. Ann. 169; Williams v. Barlow, 49 Ga. 530; Patten v. Stewart, 26 Ind. 395.

[161] Coriel v. Ham, 4 G. Greene, 455, 61 Am. Dec. 134; Burd v. Dansdale, 2 Binn. 80; Luther v. McMichael, 6 Humph. 298; Richards v. Holmes, 18 How. 147; Russell v. Richards, 11 Me. 371, 26 Am. Dec. 532; Coxe v. Halstead, 1 Green Ch. 311; Allen v. Cole, 1 Stock. 286, 59 Am. Dec. 416; Dexter v. Shepard, 117 Mass. 480.

Digitized by Google

ever, the inference to be drawn from them is, that if the original notice has been properly given, it confers authority upon the officer to adjourn the sale for any proper purpose, and is to be regarded as imparting sufficient publicity to the fact that a sale is to be made, and of the property and terms as described in the original advertisement, and that notice of the time to which the sale is postponed may be given by proclamation at the time first fixed for the sale, or by publication in a newspaper, or by posting, and that the notice so posted or published need not be in the form or for the time required in the original notice; and, finally, that whatsoever notice be given, the sale must be permitted to stand, unless it appears probable that, from some inadequacy in the notice so given, substantial injury has resulted to one of the parties.[162] In New Jersey a statute provides that if a sale of land is adjourned for more than one week, the adjournment shall be published in the same newspaper in which the notice of sale was published, but that it shall not be necessary to continue the publication of the original advertisement, but a statement of the parties to the cause and the time and place of such adjournment shall be sufficient.[163] When an adjournment is granted at the request of either of the parties to the action, it is said that he must bear any loss arising therefrom, from the depreciation in the

[162] Hollister v. Vanderlin, 165 Pa. St. 248, 44 Am. St. Rep. 657; Horton v. Bassett, 16 R. I. 419.

[163] Avon etc. I. Co. v. Finn (N. J. Err. & App.), 41 Atl. 360. In this case a notice of adjournment in the following form was sustained: "Adjourned Sheriff's Sale. The Avon by the Sea Land and Improvement Company, at the suit of Ann Finn, stands adjourned to Monday, the seventeenth day of January, 1898, at the courthouse at Freehold, in the county of Monmouth, in New Jersey, at 2 o'clock P. M., Houston Fields, sheriff. Dated January 3, 1898."

Digitized by Google

value of the property, or otherwise.[164] The officer conducting the sale, though invested with a very large discretion in respect to adjournments, is not to exercise it in a wanton or capricious manner, and is responsible for its abuse.[165] "The discretion to adjourn a sale possessed by a sheriff at the common law, or for 'good cause' under our statute, is a legal discretion justified by the exigency of the situation—not the exercise of an arbitrary preference as to the course the officer will pursue. The execution plaintiff had the right to control the writ, in the absence of a sufficient legal reason for postponing the sale," and, if the sale was postponed without such a reason, the officer is answerable to the plaintiff for any damages suffered by him.[166] If, after a bid is made, a sale is adjourned, the bid is to be treated as withdrawn.[167] The power to adjourn a sale does not exist when the officer has not taken the steps necessary to authorize him to hold such sale. If the notice of the sale given by him is defective in being for too short a time, it cannot be validated by postponing the sale to a future time.[168]

From the provision to be found in the statutes of many of the states requiring property to be sold under execution to the highest bidder, and directing the sheriff to postpone a sale for want of bidders, it has been claimed that there can be no valid sale when no person other than the plaintiff in the writ or his agents were present,[169] and, at all events, that the sheriff ought to

[164] Williams v. Gartrell, 4 G. Greene, 287.

[165] Todd v. Hoagland, 36 N. J. L. 352.

[166] Gilbert v. Watts-De Golyer Co., 169 Ill. 129, 61 Am. St. Rep. 154.

[167] Donaldson v. Kerr, 6 Pa. St. 486.

[168] Sawyer v. Wilson, 61 Me. 529.

[169] Ricketts v. Unangst, 15 Pa. St. 90, 53 Am. Dec. 572.

Digitized by Google

adjourn the sale in such an emergency. If it were necessary for the plaintiff to produce some bona fide bidder other than himself, it would often be impossible for him to enforce his judgment. Probably the officer is warranted in adjourning the sale where the bid offered is grossly inadequate, and its acceptance must result in a needless sacrifice of the defendant's property. The officer is not, however, justified in adjourning the sale solely on the ground that but one bidder is present,[170] and there can be no doubt that the mere want of competition or of the presence of more than one bidder does not render a sale invalid, nor necessarily constitute any reason for setting it aside.[171]

§ 289. The Place of Sale of Real Estate.—Real estate is usually sold at the door of the courthouse of the county in which it is situated.[172] This rule is understood to be applicable to execution sales upon common-law judgments in the national courts. Hence, they will be directed to be made at the door of the courthouse of the county in which the land is situate, though the writ under which they are made is in the hands of the United States marshal.[173] If there are two or more courthouses in a county, at each of which are held courts of co-equal powers and jurisdiction, an execution sale may be made at the door of either.[174]

Whenever the place of sale is fixed by statute, or by

[170] Gilbert v. Watts-De Golyer Co., 169 Ill. 129, 61 Am. St. Rep. 154; State v. Johnson, 1 Hayw. 293.

[171] Gilbert v. Watts-De Golyer Co., 169 Ill. 129, 61 Am. St. Rep. 154; Equitable T. Co. v. Shrope, 73 Ia. 297; Learned v. Geer, 139 Mass. 31; Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577.

[172] Smith v. Morse, 2 Cal. 524; Sessions v. Peay, 28 Ark. 89.

[173] Sinclair v. Stanley, 64 Tex. 67; Moody v. Moeller, 72 Tex. 635, 13 Am. St. Rep. 839; Borneman v. Norris, 47 Fed. Rep. 438.

[174] Anniston P. Works v. Williams, 106 Ala. 324, 54 Am. St. Rep. 51.

Digitized by Google

a decree, or by the notice of the sale, a sale at any other place is certainly irregular, and ought not to be enforced against the objection of any of the parties in interest.[175] This irregularity may be waived by the defendant.[176] Where a sale takes place, not at, but very near, the place designated, this is regarded as a substantial compliance with the law.[177] Therefore it was held that a sale under a trust deed, advertised to be held at one door of a courthouse, might take place at another.[178]

If the county courthouse ceases, temporarily or otherwise, to be occupied as such, and the sessions of the court are publicly held at a different place, a sale may probably be made at this last-named place.[179] In Louisiana, it has been decided that a change in the courthouse, made pending the advertisement of sale, imposes on the officer the duty of making the sale at the building which happens to be in use as a courthouse on the day appointed for the sale.[180]

Sales made at an improper place are sometimes held to be voidable merely, and to be valid until set aside.[181] This seems to be a very reasonable and just view of the question; but it is undoubtedly in conflict with the ma-

175 Talley v. Starke, 6 Gratt. 339.

176 Biggs v. Brickell, 68 N. C. 239.

177 Patterson v. Reynolds, 19 Ind. 148; Perkins v. Spaulding, 2 Mich. 157.

178 Hickey v. Behrens, 75 Tex. 483.

179 Kane v. McCown, 55 Mo. 181; Longworthy v. Featherston, 65 Ga. 165, where a sale was sustained, on it appearing that the officer first went to the site of "the burnt courthouse, and the weather being hot, he made proclamation, and took the crowd to a shade some hundred or hundred and fifty yards off, in full view of the courthouse site, and there sold the property."

180 Union Bank v. Smith, 3 La. Ann. 147.

181 Street v. McClerkin, 77 Ala. 580; Nixon v. Cobleigh, 52 Ill. 387.

Digitized by Google

jority of the authorities.[182] In several instances United States marshals have sold real property at the door of the United States courthouse instead of at the door of the courthouse of the county in which the lands sold were situate, and in all it was held that the sales were based upon common-law judgments, and were unauthorized and void.[183]

As to the place of selling real property under execution under judgments at common law rendered in the courts of the United States, Congress has never taken any action, and it is therefore controlled by state laws. Sales, whether of real or personal property, made under any order or decree of the courts of the United States, must be at public auction at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order may direct, but the court may, as to personal property, order the sale in some other manner.[184]

Lands must always be sold by an officer of the county in which they are situate; otherwise the sale will be void.[185] The place of sale is also generally required to be in such county. If so, a sale in another county is unauthorized, and void.[186] If the lands of the defendant are situated partly in two counties, a sale of the whole

[182] Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Grace v. Garnett, 38 Tex. 159; Koch v. Bridges, 45 Miss. 247; Peters v. Caton, 6 Tex. 554; Brown v. Christie, 27 Tex. 73, 84 Am. Dec. 607; Tippett v. Mize, 30 Tex. 361, 94 Am. Dec. 313; Sinclair v. Stanley, 64 Tex. 67; Paulson v. Hall, 39 Kan. 365; Wortham v. Basket, 99 N. C. 70.

[183] Jenners v. Doe, 9 Ind. 461; Cassedy v. Norris, 49 Tex. 613; Sinclair v. Stanley, 64 Tex. 67; Moody v. Moeller, 72 Tex. 635, 13 Am. St. Rep. 839.

[184] Desty's Fed. Proc., § 526a.

[185] Hanby v. Tucker, 23 Ga. 132, 68 Am. Dec. 514; Treaster v. Fleisher, 7 Watts & S. 137; Morrell v. Ingle, 23 Kan. 32.

[186] Thacher v. Devol, 50 Ind. 30.

Digitized by Google

by an officer of one county is good as to the lands in that county, and void as to the lands in the other county.[187] This was held to be true where an order of sale issued for the sale of a single parcel of land containing only forty acres, through which ran a stream forming the boundary line between two counties.[188] The statutes of Georgia have provided in like cases that a levy and sale of the whole tract may be made by the sheriff of the county in which the defendant resides.[189] In Kentucky, unless the judgment ordering a sale of real property otherwise directs, it may be sold at the door of the courthouse of the county in which the property, or the greater part thereof, is situated.[190]

After the entry of the judgment, the county may be divided, and the lands of the defendant become a part of the new county. In such an event they must be sold by the officer of such new county.[191] If, however, before the division, a specific lien has attached to the property, and a writ thereafter issues which requires no levy, but merely commands the sheriff to sell the property upon which the lien has been acquired, the sale may be made by a sheriff of the old county.[192]

If the statute is silent with respect to the place within the county where the sale may be made, the officer may select it, and his selection, unless manifestly

[187] Ared v. Montague, 26 Tex. 732, 84 Am. Dec. 603; Finley v. R. R. Co., 2 Rich. 567; Menges v. Oyster, 4 Watts & S. 20, 39 Am. Dec. 56; Holmes v. Taylor, 48 Ind. 169.

[188] Holmes v. Taylor, 48 Ind. 169.

[189] Famborough v. Amis, 58 Ga. 519.

[190] Barnes v. Jackson, 85 Ky. 407.

[191] Kent v. Roberts, 2 Story, 591. If the writ has been levied before the division of the county, the officer levying may make the sale. Lofland v. Ewing, 5 Litt. 42, 15 Am. Dec. 41.

[192] Tyrrell v. Rountree, 7 Pet. 464; Lofland v. Ewing, 5 Litt. 42, 15 Am. Dec. 41.

Digitized by Google

unfair and unreasonable, will not be controlled by the courts, nor will it afford a ground for vacating the sale. He may hold the sale at his office, though it is distant twenty miles from the lands sold.[193]

§ 290. The Place for Selling Personalty.—The sale of personal property must always take place at or near the place where such property is. Sales of property of this character must undoubtedly result in a great sacrifice to the defendant, unless it can be seen and examined by the bidders, and can be delivered to the purchasers on the day of the sale. Hence, the law everywhere requires that personal property shall not be sold under execution, unless it is either present at the place of the sale, or is so near there that it can be readily examined by the bidders.[194] Therefore, if, after a levy upon personal property, the defendant, or another, obtains possession of it, and takes it beyond the state, no sale can be made by the levying officer, because he cannot have the property present thereat.[195] If, however, the silverware of a hotel is being sold under execution, the law requiring execution sales to be open to the inspection of bidders is not violated if the sale takes place in the rotunda of the hotel, if part of the silverware is on a table in an adjoining room and the remainder in the storeroom downstairs, and both rooms are unlocked and open to the inspection of the public.[196] A piano was left in a private room of a hotel

[193] Howland v. Pettey, 15 R. I. 603.

[194] Yoemans v. Bird, 81 Ga. 340; Hoysey v. Knowles, 74 Md. 602; Penney v. Earle, 87 Me. 167; Kopp v. Witmoyer, 43 Pa. St. 219, 82 Am. Dec. 561; Bennett's B. I. Co.'s Appeal, 65 Pa. St. 242; Smith v. Morse, 2 Cal. 524; Burns v. Ray, 18 B. Mon. 392. The rule applies to the sale of the moiety, as well as to a sale of the whole. Brown v. Lane, 19 Tex. 203.

[195] Hoysey v. Knowles, 74 Md. 602.

[196] Earle v. Gorham M. Co., 37 N. Y. Supp. 1037.

Digitized by Google

about two hundred and fifty yards from the place of sale. An adjournment of the sale was had for half an hour to give the persons present, of whom there were about fifty, an opportunity to visit the hotel and examine the piano. Three only of these availed themselves of the invitation. A sale was then had in which the instrument sold for a very small part of its actual value. It further appeared that the purchaser was not given possession by the sheriff, but secured such possession by means of an action in claim and delivery. The sale was declared invalid, but it is difficult to determine whether this declaration resulted from the fact that the piano was remote from the place of sale, or from the fact that it did not appear to have been in the possession of the officer at the time of the sale.[197] The particular property to be sold must also be specified. Hence, a sale of thirteen out of a band of twenty-one sheep, without specifying which thirteen, is regarded as entirely void.[198] An officer made a general levy on all the hay in a barn, estimated to amount to eighteen tons. He made a sale at a point about a third of a mile distant from this barn, which purported to be of the ten tons of hay from the top of the mow, without undertaking to separate it from the balance of the hay. The sale was regarded as ineffective both because those desiring to purchase did not have any opportunity to examine the hay and determine its quality, and it was not separated from the mass, and "that, in fact, no hay was present or in sight at the sale, and no attempt of delivery of any kind was made by the officer, and that it

[197] Aston v. Morfhew, 113 N. C. 460.

[198] Warring v. Loomis, 4 Barb. 484; Sheldon v. Soper, 14 Johns. 352; Cresson v. Stout, 17 Johns. 116, 8 Am. Dec. 373. If part of the property is present and part absent, the sale is valid as to the portion present. Linnendoll v. Doe, 14 Johns. 224.

Digitized by Google

did not appear that the plaintiff ever saw the hay until taken and delivered to him by the officer," at a time subsequent to the sale. The court said: "Where there is a sale of a portion of a large mass of unpressed hay, or of property of like character, and no separation is made of the portion sold, and no delivery is made of any portion of it to the vendee, he has not such title as will sustain an action of replevin." [199]

There may be instances in which it is not practicable to have the property present at the sale, or in which the character of the property sold can readily be ascertained without having it in view of the bidders. In all such cases there must necessarily be some relaxation of the general rule; [200] but, even in those cases, the officer should employ such means as are in his power to give the bidders the best opportunities which they can have of ascertaining the nature and value of the property. In a case where a lot of stereotype plates were sold, it was shown that they were not, at the sale, removed from the vault in which they were ordinarily kept. The sale was sustained because impressions made from the plates were exhibited at the sale, and the vault was unlocked, so that the plates could have been examined, and because their chief value arose, not from the material out of which they were made, but from the books which they were intended to print.[201] A sale of personal property not within the view of the bidders may be vacated,[202] unless its presence was waived by the defendant.[203] If neither vacated nor waived, it is, by a decided preponderance of the authorities, declared to

[199] Lowry v. Ellis, 85 Me. 500.
[200] Phillips v. Brown, 74 Me. 549.
[201] Bruce v. Westervelt, 2 E. D. Smith, 440.
[202] Foster v. Mabe, 4 Ala. 402, 37 Am. Dec. 749.
[203] Gift v. Anderson, 5 Humph. 577; Cook v. Timmons, 67 Ill. 203.

Digitized by Google

be void.[204] We think the more reasonable rule is, that such sales are voidable only. "Many excellent reasons," said the supreme court of Missouri, "may be given why, ordinarily, the property should be present when the sale takes place; but we do not think it would be wise to declare that a sale of personal property, after a valid levy thereon, will, in all cases, even though acquiesced in by the parties, be absolutely void, unless the property be present at the place of sale. Cases may be imagined where such a rule would not only be without benefit, but would be productive of inconvenience and positive detriment to the parties interested; and we think it a much better rule to declare such sales to be voidable only by the debtor in execution, for cause shown to the court, in a motion to set aside the sale for that reason."[205] The rule regarding the presence of personal property at the sale is not understood as being binding upon courts of equity, and they may, therefore, in directing a sale of such property, order it to be made otherwise than in its presence, and such order, though not in express terms, may be implied from directions

[204] Tibbetts v. Jageman, 58 Ill. 43; Herod v. Bartley, 15 Ill. 58; Cresson v. Stout, 17 Johns. 116, 8 Am. Dec. 373; Ainsworth v. Greenlee, 3 Murph. 470, 9 Am. Dec. 615; Blanton v. Morrow, 7 Ired. Eq. 47, 53 Am. Dec. 391; Linnendoll v. Doe, 14 Johns. 222; Gaskill v. Aldrich, 41 Ind. 338; Baker v. Casey, 19 Mich. 220; Newman v. Hook, 37 Mo. 207, 90 Am. Dec. 378; Bakewell v. Ellsworth, 1 N. Y. Leg. Obs. 346; Smith v. Tritt, 1 Dev. & B. 241, 28 Am. Dec. 565; Brown v. Pratt, 4 Wis. 513, 65 Am. Dec. 330; Gift v. Anderson, 5 Humph. 577; Collins v. Montgomery, 2 Nott & McC. 392; Bostick v. Keizer, 4 J. J. Marsh. 597, 20 Am. Dec. 237; Reynolds v. Ayre, Trin. Term, New Brunswick, 1862; Murphy v. Hill, 77 Ind. 129; Kennedy v. Clayton, 29 Ark. 270; Winfield v. Adams, 34 Mich. 437; Rowan v. Refeld, 31 Ark. 648; Wright v. Mack, 95 Ind. 332.

[205] Eads v. Stephens, 63 Mo. 90; Foster v. Mabe, 4 Ala. 402, 37 Am. Dec. 749; Kean v. Newell, 1 Mo. 754, 14 Am. Dec. 321; Hazard v. Burton, 4 Harr. (Del.) 62.

Digitized by Google

concerning the sale, which, if complied with, render it exceedingly difficult to have the property present at the place of sale.[206]

For selling property at an improper place, officers have been held responsible to the defendant as trespassers ab initio. Speaking of such a sale, the supreme court of Vermont said: "The defendant departed from the authority with which the law clothed him, in virtue of the execution which he held, in making the sale at the place where he did make it. It was only by that authority that he had any right to take, or hold, or sell, or apply the avails of the property. When he did the unlawful act of selling the property at that place, he lost the protection of the execution accorded to him by the law, and the act thereupon assumed the same legal character, and involved the same legal consequences, as if he had not held the execution." Hence, though the proceeds of the sale were applied to the satisfaction of a valid judgment against the defendant, the court refused to diminish the damages to that extent, because "in order to entitle the officer to apply the property in payment of that judgment it was necessary for him to make a legal sale of it." [207]

§ 291. By Whom the Sale may be Made.—Sales under execution must be made by a sheriff or constable, or by his deputy.[208] An auctioneer may be employed to cry the sale. If so, he is employed by and acts under the immediate direction of the officer, who must be present at the sale.[209] If the sheriff is required to do any act

[206] Morrow v. McGregor, 49 Ark. 67.

[207] Hall v. Ray, 40 Vt. 576, 94 Am. Dec. 440; Evarts v. Burgess, 48 Vt. 206.

[208] Hamer v. McKinley etc. Co., 52 Neb. 705.

[209] Crocker on Sheriffs, § 481; Galbraith v. Drought, 24 Kan.

Digitized by Google

in person, the writ should be directed to him personally, mentioning his name. Unless it is so directed, it may be executed by a deputy or under-sheriff, as well as by the high sheriff.[210] Where the sheriff is interested in the writ, he is disqualified from serving it. It must then be directed to the coroner. If the sheriff is a party to the judgment in name or in interest, neither he nor any of his deputies can make a valid levy or sale.[211]

The officer who commences must usually complete the execution of the writ.[212] His term of office may expire after the levy and before the sale. This does not terminate his authority, nor even confer upon his successor power to make the sale, if the venditioni exponas should be directed to him.[213] By the levy of the writ upon chattels, the officer acquires a special property therein. This property continues after his removal from office, and even after his death. Hence, a sale

591; Smith v. Harrigan, 27 Abb. N. C. 322; Wallis v. Shelby, 30 Fed. Rep. 747.

[210] Levett v. Farrar, Cro. Eliz. 294; Wroe v. Harris, 2 Wash. (Va.) 126; Tillotson v. Cheetham, 2 Johns. 63.

[211] Collais v. McLeod, 8 Ired. 221, 49 Am. Dec. 376; Bowen v. Jones, 13 Ired. 25, 55 Am. Dec. 426; Riner v. Stacy, 8 Humph. 288; Chambers v. Thomas, 3 A. K. Marsh. 536; May v. Walters, 2 McCord, 470; ante, § 40.

[212] Lofland v. Ewing, 5 Litt. 42, 15 Am. Dec. 41; Clark v. Pratt, 55 Me. 546; Doolittle v. Bryan, 14 How. 563; Miner v. Cassat, 2 Ohio St. 198; Holmes v. Crooks, 56 Neb. 456.

[213] Ryan v. Couch, 66 Ala. 244; Purl v. Duvall, 5 Har. & J. 69, 9 Am. Dec. 490; Ayre v. Aden, 4 Cro. Jac. 78; Gibbes v. Mitchell, 2 Bay, 120; Clerk v. Withers, 6 Mod. 298; Salk. 322; Ld. Raym. 1072; Cooper v. Chitty, 1 Burr. 34; 1 W. Black. 69; Bank of Tennessee v. Beatty, 3 Sneed, 305, 65 Am. Dec. 58. In Missouri, the levying officer may turn over the writ to his successor, or may retain it and go on with the sale. Kane v. McCown, 1 Cent. L. J. 114. See ante, § 62. This appears to be the rule in Washington. Lewis v. Bartlett, 12 Wash. 212, 50 Am. St. Rep. 885.

Digitized by Google

may be made by his executor or administrator.[214] A levy on real estate does not vest any special property in the officer. Hence, a venditioni exponas issued after the expiration of the term of the officer who made the levy must, in some states, be executed by his successor, while in others it may be executed by either.[215] An officer having commenced to execute a writ must complete it, and cannot release himself from this duty by handing the writ over to his successor.[216] If, however, he has merely received the writ, and done nothing toward its execution, he has not acquired any such special property as authorizes him to make a levy and sale after the end of his official term.[217] Although the sheriff is the person designated by law to execute the process of the court, another officer, or even a person who has no official capacity, may be appointed by the court to make a sale to be made in pursuance of a decree of the court.[218] The officer conducting the sale is a mere agent, bound to pursue the directions of his writ and of the law. He cannot impose terms,[219] create liabilities,[220] nor make reservations[221] not sanctioned by the writ and the law.

The authority of the officer to make the sale is a question of the utmost consequence to the purchaser.

[214] Read v. Stevens, Coxe, 264; Sanderson v. Rogers, 3 Dev. 38.

[215] Bank of Tennessee v. Beatty, 3 Sneed, 305, 65 Am. Dec. 58. See ante, § 62. A United States marshal may, after his removal from office, proceed with the execution of writs then in his hands, though so to do requires him to sell real estate. Doolittle v. Bryan, 14 How. 563; Miner v. Cessnat, 2 Ohio St. 198.

[216] State v. Hamilton, 1 Harr. (N. J.) 153; Leavitt v. Smith, 7 Ala. 175.

[217] Bondurant v. Buford, 1 Ala. 359, 35 Am. Dec. 33.

[218] Meetze v. Padgett, 1 S. C. 127; Adams v. Kleckley, 1 S. C. 142.

[219] Loomis's Appeal, 22 Pa. St. 312.

[220] Stevenson v. Black, 1 Saxt. 338.

[221] Howell v. Schenck, 4 Zab. 89.

Digitized by Google

The validity of the sale can scarcely be held dependent upon the title of the acting officer to his office. It is a general rule that the title of officers de facto cannot be questioned collaterally, but only by proceedings instituted expressly for that purpose. This rule, no doubt, applies in favor of purchasers at execution sales.[222] But the title to his office may sometimes be conceded without establishing his power to make the sale in question. Thus, as we have already shown, if he is acting outside of the county of which he is an officer, the sale is void.[223] The sale must be made by an officer, personally, or under his immediate direction;[224] and the defendant's attorney has no power to stipulate that it may be made by a private person.[225] A sheriff or constable has no authority to act under a writ directed to another sheriff or constable, and if he does so, a sale made by him is void.[226] So a sale made by an ex-sheriff, in a case where the sheriff in office ought to have acted,[227] or by the sheriff in office where the ex-sheriff [228] is the one empowered to act, is void. The division of a county after the levy of an execution does not divest the sheriff levying the writ of power to make the sale.[229] The rule pronouncing sales void, when conducted by officers having no authority to make them, may operate harshly in some instances, but is justified on the ground that the officer is known not to be acting

[222] Doty v. Gorham, 5 Pick. 487, 16 Am. Dec. 417; Street v. McClerkin, 77 Ala. 580.

[223] Ante, § 289.

[224] Heyer v. Deaves, 2 Johns. Ch. 154.

[225] Kronschnable v. Knoblauch, 21 Minn. 56.

[226] Bybee v. Ashby, 2 Gilm. 151, 43 Am. Dec. 47; Gordon v. Camp, 3 Pa. St. 349, 45 Am. Dec. 647.

[227] Bank of Tennessee v. Beatty, 3 Sneed, 305, 65 Am. Dec. 58.

[228] Purl v. Duvall, 5 Har. & J. 69, 9 Am. Dec. 490.

[229] Lofland v. Ewing, 5 Litt. 42, 15 Am. Dec. 41.

Digitized by Google

for himself, but as an agent, and that it is always incumbent upon a person dealing with one who assumes to act as an agent to ascertain at his peril the limits of the latter's authority.

The authority to make a sale under a decree in chancery is usually conferred by the decree, from an inspection of which purchasers may ascertain by whom the sale is to be conducted, and, generally, the mode in which his authority is required to be exercised.[230] The general vesting by statute in a class of officers of authority to execute a decree seems not to impair the power of the court to appoint a special master to make a sale.[231] The sale is made by the court, and whether the officer deputed to make it is styled a master, commissioner, or trustee, he is a mere instrumentality of the court.[232] His failure to give a bond, conditioned for the proper performance of his duties, will not affect the validity of a sale made by him and confirmed by the court.[233]

§ 292. To Whom the Sale may be Made.—In many of the states, statutes have been enacted forbidding the officer executing the writ, and all of his deputies, from purchasing at or being interested in the sale; and declaring that any sale in which he or they shall be so interested shall be regarded as fraudulent and void. These statutes but give expression to a policy which was everywhere respected long anterior to their pas-

[230] Blossom v. R. R. Co., 3 Wall. 205.

[231] Coras v. Bertoulin, 45 La. Ann. 160; American etc. Co. v. Nye, 40 Neb. 726; Northwestern etc. Co. v. Mulvihill, 53 Neb. 588; McCrady v. Jones, 36 S. C. 136; Connell v. Wilhelm, 36 W. Va. 598; Mayer v. Wick, 15 Ohio St. 548.

[232] Bolgiano v. Cook, 19 Md. 375; Sewall v. Costigan, 1 Md. Ch. 208.

[233] Nicholl v. Nicholl, 8 Paige, 349.

Digitized by Google

sage. It was always understood that the officer holding an execution should be removed from all temptations to the fraudulent exercise of his authority. To accomplish this object, it has ever been held that he should, under no circumstance, be interested in the sale. Hence, when, in a proceeding instituted to vacate a sale, it is shown that the officer purchased in his own name, or that some other person made the purchase for the officer's benefit, the vacation must be made; and this result cannot be avoided by showing that the transaction was fair, the bidding spirited, and the price paid was the full value of the property.[234] This rule applies to sales made by trustees, and to those made under decrees of chancery and probate courts.[235] "The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or

[234] Mills v. Goodsell, 5 Conn. 475, 13 Am. Dec. 90; Mapps v. Sharpe, 32 Ill. 13; Mark v. Lawrence, 5 Har. & J. 64; Robinson v. Clark, 7 Jones, 562, 78 Am. Dec. 265; Johnson v. Pryor, 5 Hayw. 243; Scott v. Mann, 36 Tex. 157; Dempster v. West, 6 Chic. L. N. 335; McConnel v. Gibson, 12 Ill. 128; Downing v. Lyford, 57 Vt. 507.

[235] Saltmarsh v. Beene, 4 Port. 283, 30 Am. Dec. 525; Church v. Sterling, 16 Conn. 388; Grider v. Payne, 9 Dana, 190; Lee v. Fox, 6 Dana, 176; Pensonneau v. Bleakley, 14 Ill. 15; Howery v. Helms, 20 Gratt. 1; Teel v. Yancey, 23 Gratt. 691. The reasons which have influenced the decisions are thus stated in Perkins v. Thompson, 3 N. H. 146: "The sheriff has the means of lessening the price of the articles sold by determining the time and place of sale favorably to his own views. And this might be so done that no human tribunal could detect the fraud. If it were once decided, in this court, that a sheriff might be interested lawfully in the purchase of articles he himself was selling upon an execution, it would open an avenue to frauds, for the detection of which our courts have very inadequate means. And it seems to us that every principle of public policy requires that we should at once close this avenue forever by holding that in no case can a sheriff be interested in the purchase of an article he is selling as a public officer, and by treating every such purchase as voidable at the election of the debtor."

Digitized by Google

in which he represents another, whether he has an interest in it or not—per interpositam personam—carries fraud on the face of it." "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent in the private relations in which the vendor and purchaser may stand toward each other. The disability to purchase is a consequence of that relation between them which inspires in the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability, in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It, therefore, prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposing characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."[236] The usual rule of law that an agent is not

[236] Michoud v. Girod, 4 How. 555; Kruse v. Steffens, 47 Ill. 114. A commissioner in chancery, having authority to conduct a sale, cannot purchase thereat, directly nor indirectly. McConnel v. Gibson, 12 Ill. 128. A purchase made by him in the name of a third person is voidable. Winans v. Winans, 22 W. Va. 678.

Digitized by Google

deemed to have authority to represent two principals whose interests are conflicting applies with special force to execution sales. A sheriff or other officer making a sale cannot, by an intending purchaser, be vested with any discretion to bid for him or on his account.[237] He can neither bid for himself nor for another.[238] We apprehend that this rule must be confined to cases in which the officer, in acting as agent, would be expected to exercise his discretion in making bids, and to purchase the property at the lowest price for which it could be obtained. It ought not to be extended to cases where he is authorized by letter,[239] or otherwise, to offer a specified amount on behalf of an absent bidder.

The question is one of great delicacy. There can be no doubt that the sheriff must keep himself free from the position of agent of the purchaser. In Ohio, it is settled that if he can receive a bid by writing at all, it cannot be prior to the sale.[240] In that state, an officer, while on his way to a place where he was to make a sale of some wheat, met S., who handed him a written bid of ten dollars for the property to be sold. No person attended the sale. The officer offered the property for sale in the usual manner—"cried said written bid in the usual manner of crying bids for sale of personal property, and, after crying said sale a reasonable time, then and there accepted said bid," and declared the wheat sold to S. The sale of the property was for about one-tenth of its value; and it, under the circum-

[237] Caswell v. Jones, 65 Vt. 457, 36 Am. St. Rep. 879.

[238] Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; McLeod v. McCall, 3 Jones, 87; Chambers v. State, 3 Humph. 237. The rule is otherwise in Texas. Scott v. Mann, 36 Tex. 157.

[239] Dickerman v. Burgess, 20 Ill. 266; Brannin v. Broadus, 94 Ky. 33.

[240] Terrill v. Auchauer, 14 Ohio St. 80.

Digitized by Google

stances, might, perhaps, have been vacated for gross inadequacy; but it was adjudged void on the ground that the officer could not thus receive and accept a bid.[241]

[241] Sparling v. Todd, 27 Ohio St. 521. In this case the court said: "The law contemplates—the duty demands—the absolute impartiality of the constable in conducting the sale. Circumstances, or the condition of a bidder at the sale, may require his determination as to whether he should receive an offered bid. To do this in a manner contemplated by the law, he must then be free from all actual or implied engagements with others in regard to the property to be sold. He is to consider such bids for the property, and none other, as are offered to him as constable at the time of the sale or offering. Should he receive a proposed bid from a person at another time and place than the time and place advertised, he must, in relation thereto, be treated as the agent of such person, and when, at the sale, he offers the bid, he does so as the agent of such person. The law will not tolerate this dual condition of the officer. The law makes him the agent of the judgment debtor and creditor in conducting the sale, and charges him with the duty of seeing that no harm is done to the interests of either. To take upon himself, directly or indirectly, the relation of private agent for the bidder, violates the spirit, if not the letter, of section 175 of the statute. Saund. & C. 800. That provides: 'It shall not be lawful for any justice of the peace who issued the execution, nor for the constable holding the execution, to purchase, either directly or indirectly, any property sold under such execution.' If either should do so, the statute makes him 'liable to the action of the party injured thereby.' It is intended by this that the constable shall so conduct the sale, and himself in relation thereto, that no suspicion of partiality or wrong may attach to his official conduct in relation thereto. The constable may receive bids in writing or through any other medium, provided they come to him as bids at the time of the sale. He must not bid for himself, directly or indirectly. No more can he lawfully, directly or indirectly, bid for another at his official sale. How was it in this case? Some time in the forenoon of that day the defendants had a meeting about one mile from the place of sale. The hour of sale had not come. Sparling handed Porter an offer in writing of ten dollars for the wheat levied on. Sparling was not present at the time of the alleged sale to offer the constable a bid for the property. The proposed offer of ten dollars handed by Sparling to Porter was not, at the time it came into the possession of Porter, a bid, for the reason that the property was not then offered for sale. If Sparling's offer ever becomes a bid at the time of the sale, it must become so through the agency of Porter; there

Digitized by Google

If a sheriff, instead of conducting a sale himself, employs an auctioneer to do so, the latter, though not a deputy, must be regarded, to the same extent as the sheriff himself, as forbidden to have any interest in the sale, and if it is established that the auctioneer who acted for the sheriff in making a sale became interested therein, as by having the property bid off for his benefit, or to be held wholly or partly for him, the sale has no greater validity than if it had been made to, or for the benefit of, the sheriff.[242]

In Ohio and Nebraska, a sale made to the officer, or to one of the appraisers, is by statute declared to be void. The courts have, nevertheless, construed the word "void," as here used, to mean "voidable" only.[243] This construction does not accord with that adopted elsewhere. A purchase by or in the interest of a sheriff or

is no other person present to offer the constable the proposed bid save James Porter. Porter, then, in offering the proposed bid of Sparling to himself, as constable at the sale, must have acted as agent of Sparling. Porter was the sole person present at the time and place advertised for the sale; had in his possession Sparling's proposition for a bid, which could only reach the public through the constable, and when he did offer and cry Sparling's proposition as a bid he assumed to act in the double capacity of individual and officer. By voluntary action he became the individual agent of Sparling, when by the law he is instructed to act as the impartial agent of the debtor and creditor. In this way, Todd's property was sacrificed. Wheat, as shown by the proofs, worth more than one hundred dollars, was declared sold on an alleged bid of ten dollars, in satisfaction of a claim on which there was due, including costs, not more than ten dollars. We think this transaction should not be upheld. The constable's mode of disposing of the debtor's property was without warrant of law, and this alleged sale cannot receive our sanction."

[242] Galbraith v. Drought, 24 Kan. 591; Smith v. Harrigan, 27 Abb. N. C. 322; Brock v. Rice, 27 Gratt. 812.

[243] Terrill v. Auchauer, 14 Ohio St. 80; McKeighan v. Hopkins, 19 Neb. 34.

Digitized by Google

constable is, under the statutes now in force, usually,[244] but not universally,[245] treated as void. These statutes are not understood as inhibiting a deputy sheriff from purchasing property under a writ in favor of himself, where the sale is conducted by his principal,[246] or by another deputy.[247] "A turnkey or assistant jailer is not within the operation of the act forbidding sheriffs and their deputies from becoming purchasers on sales under execution."[248] It has been held that the purchase of personal property by a sheriff might be treated as a conversion, and that the defendant could recover the value of the property, less the amount paid by the sheriff.[249]

As a general rule, all persons, other than the officer conducting the sale and his deputies, are permitted to become purchasers, provided they are competent to contract, and do not occupy a relation with the defendant in which they will not be permitted to make their interests antagonistic to his. An attorney having charge of the sale of real estate under execution cannot purchase the land for his own benefit, to the prejudice of his clients, or either of them. He cannot insist upon his purchase unless he paid an amount sufficient to satisfy his client's judgment.[250] As the rela-

[244] Woodbury v. Parker, 19 Vt. 353, 47 Am. Dec. 695; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; Chandler v. Moulton, 33 Vt. 247; Robinson v. Clark, 7 Jones, 562, 78 Am. Dec. 265; Johnson v. Pryor, 5 Hayw. 243; McLeod v. McCall, 3 Jones, 87; Wickliff v. Robinson, 18 Ill. 145.

[245] Farnum v. Perry, 43 Vt. 473.

[246] Jackson v. Collins, 3 Cow. 89; Cowles v. Hardin, 101 N. C. 388, 9 Am. St. Rep. 36.

[247] Worland v. Kimberlin, 6 B. Mon. 608, 44 Am. Dec. 785.

[248] Jackson v. Anderson, 4 Wend. 474.

[249] Perkins v. Thompson, 8 N. H. 146.

[250] Jones v. Martin, 26 Tex. 57; Leisenring v. Black, 5 Watts, 303, 30 Am. Dec. 322; Burke v. Daly, 14 Mo. App. 542. In Arkansas, the

Digitized by Google

tion of client and attorney is necessarily a confidential one, the latter will not be permitted to maintain any attitude of hostility to the interests of the former, and, hence, if he makes any purchase in his own name, or for his own interest, his client will certainly be permitted to treat the attorney as having acted as his trustee, and hence is not at liberty to enforce any advantage apparently gained by the purchase. If the attorney for the plaintiff purchases the property at a sum sufficient to satisfy the judgment, this act can by no legal possibility prejudice the plaintiff, and the attorney may hold the purchase for his own benefit. If the attorney for the defendant makes a purchase, there is no doubt that he may enforce it as against all persons except his client, and hence, in a state where an execution or judicial sale has the effect of cutting off all other encumbrances, this effect cannot be denied to a sale because it was made to an attorney for the judgment debtor.[251] A sale may be vacated, when, being in partition, it was made to the attorney of all the parties, because it is against public policy to permit him, while having control of the sale, and the other proceedings, to assume a position which may induce him to sacrifice the interests of his client.[252] Where a sale is made to an attorney, and is not vacated, we assume that it is incumbent on his client, wishing the advantage of the sale, to elect, within a reasonable time, to bear the

attorney who prepares the petition for and obtains an order of sale, and the judge who grants such order, are incompetent to become purchasers at the sale. West v. Waddill, 33 Ark. 575; Livingston v. Cochran, 33 Ark. 294. The better rule is, that an attorney may purchase, subject to the power of equity to vacate the purchase, unless shown to be equitable. Grayson v. Weddle, 63 Mo. 523; Leconte v. Irwin, 19 S. C. 554.

[251] Saunders v. Gould, 124 Pa. St. 237.

[252] Burke v. Daly, 14 Mo. App. 542.

Digitized by Google

burden of the sale and of discharging it by recompensing the attorney by repaying the amount of the bid and any other necessary expenditures.[253]

It is said that a director of a corporation cannot purchase its property except subject to its right to disaffirm the sale, because his duty as a director requires him to seek to have the largest price realized, while his interest as a purchaser would induce him to desire a diverse result.[254] But it has been held that the disability to purchase does not extend to one of the defendant's stockholders.[255] In truth, we do not understand that there is anything in the relation either of a stockholder or a director to the corporation which necessarily prevents him from becoming a purchaser of its property at an execution sale. That a director may, at an execution or judicial sale of the property of the corporation, be a bidder therefor we cannot doubt, nor can there be any question that a conveyance to him, pursuant to his bid, may vest in him the legal title.[256] The only question is, whether and when a purchase made by a director at such sale may be vacated in equity, or he be decreed to hold the property in trust for the corporation, or its stockholders, or creditors. Whatever may formerly have been said to the contrary, it is now settled that a director is not inhibited from dealing with the corporation. The only limitations to the power to do so are that he shall not vote as a director upon questions in which his interest must be assumed

253 Baker v. Davenport N. B., 77 Ia. 615.

254 Hoyle v. P. & M. R. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; McAllen v. Woodcock, 60 Mo. 174; Raleigh v. Fitzpatrick, 43 N. J. Eq. 501.

255 Mickles v. Rochester City Bank, 11 Paige, 118.

256 Hallam v. Indianola H. Co., 56 Ia. 178; Saltmarsh v. Spaulding, 147 Mass. 224.

Digitized by Google

to be adverse to that of the corporation, and that he cannot profit by his fraud or his failure to perform the duties of his office by taking such measures within his power as may be necessary to promote the welfare of the corporation or to save its property from sacrifice, or other improper disposition.[257] While we do not know of any decision applying these rules to the purchase of the property of a corporation by one of its directors at an execution or judicial sale, they are necessarily applicable thereto. Such a sale may be brought about by the directors to accomplish some private or individual purpose when by no means necessary, and when the exercise of the diligence with which they are chargeable must have resulted in the prevention of the sale. Under such circumstances, they surely will not be permitted to reap profit either from their fraud or their neglect. If, on the other hand, the sale is not brought about either by the act, fraud, negligence, or other misconduct of a director, he does not owe to the corporation any duty to refrain from becoming a purchaser thereat, and must, we think, be permitted to retain the fruits of his purchase.

An infant cannot be bound by his bid, because of his incapacity to contract.[258] But, doubtless, in this, as in other cases, he alone can urge his incapacity. The purchaser must have capacity to receive and hold real estate. The right of a corporation to acquire and hold

[257] Memphis etc. Co. v. Woods, 88 Ala. 630, 16 Am. St. Rep. 81; Smith v. Los Angeles etc. Assn., 78 Cal. 289, 12 Am. St. Rep. 53; Beach v. Miller, 130 Ill. 162, 17 Am. St. Rep. 291, and note; Mullanphy S. B. v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401; Chicago H. C. Co. v. Yerkes, 141 Ill. 320, 33 Am. St. Rep. 315; Garrett v. Burlington etc. Co., 70 Ia. 697, 59 Am. Rep. 469; Ten Eyck v. Pontiac etc. Co., 74 Mich. 226, 16 Am. St. Rep. 633.

[258] Kinney v. Showdy, 1 Hill, 544.

Digitized by Google

real property can generally be inquired into at the suit of the state only. In Minnesota, by whose statutes a county is a body politic and corporate having power "to purchase and hold for the public use of the county lands lying within its own limits," it has been adjudged that it has no capacity to acquire real property, except for public use, and that a purchase by the county of lands at execution sale, though under a judgment in its favor, is void, unless such lands were intended for the public use.[259] A partner may purchase at a sale of the partnership effects or of the interest of another partner. His conduct in making such purchase must be free from suspicion.[260] Neither the plaintiff nor any other person interested in the judgment is disqualified from purchasing.[261] If pledged property is taken from the possession of the pledgee and sold under execution against the pledgor, the former is competent to bid and may become the purchaser of the property at such sale.[262]

By the English chancery practice, "the conduct of the sale is usually given to the plaintiff, or other party having the carriage of the general proceedings." It would be manifestly improper to permit a party who has general charge of the proceedings to become a purchaser. When, therefore, "all the parties to the suit have liberty to bid, a solicitor, not concerned for any of them, to be mutually agreed upon, or if they cannot agree, to be nominated by the judge, will be appointed to conduct the sale, or a portion of the business there-

[259] Williams v. Lash, 8 Minn. 496.

[260] Perens v. Johnson, 3 Smale & G. 419; 3 Jur., N. S., 975.

[261] Robert Morris's Estate, Crabbe, 71; Stratford v. Twynam, Jacob, 418.

[262] Clark v. Holland, 72 Ia. 34, 2 Am. St. Rep. 230.

Digitized by Google

of."[263] Hence, in England, if any of the parties to the cause wish the privilege of becoming purchasers at the sale, "it is necessary that he should have a previous order to warrant his being admitted as a bidder."[264] Unless some fraud can be shown to have been perpetrated, or some superior knowledge taken advantage of, there is no doubt that a cotenant may purchase, at an execution or judicial sale, the moiety of any of his companions in interest, and that he may retain and assert the title thereby acquired as fully as though he were a stranger to the judgment defendant.[265]

If the execution is for a joint debt which all the cotenants are equally bound to discharge, there is more doubt of the right of any of the cotenants to purchase at the sale. If a sale is made to either, under such circumstances, his codefendants probably have the right to hold him as their trustee, and to require him to convey them their respective moieties on paying their shares of the moneys necessarily expended in effecting the purchase.[266] Either of several judgment debtors may purchase, at an execution sale, the property of his codefendants. By such sale he acquires the title to their property, and they become vested with a cause of action against him to recover his share of the debt.[267] If one of the judgment debtors is, as between himself and another, a surety only, he may purchase the lands of his principal under an execution issued upon the

[263] Daniell's Ch. Pr., 4th Am. ed., 1267.

[264] Id. 1271.

[265] Freeman on Cotenancy and Partition, citing Gunter v. Laffan, 7 Cal. 588; Brittin v. Handy, 20 Ark. 404, 73 Am. Dec. 497; Baird v. Baird's Heirs, 1 Dev. & B. Eq. 524, 31 Am. Dec. 399; Burr v. Mueller, 65 Ill. 262.

[266] Gibson v. Winslow, 46 Pa. St. 384, 84 Am. Dec. 552.

[267] Kilgo v. Castleberry, 38 Ga. 512, 95 Am. Dec. 406; Doe v. Parker, 3 Smedes & M. 114; Neilson v. Neilson, 5 Barb. 565.

Digitized by Google

judgment, and his title will be in all respects as valid and as free from other claims and encumbrances as if the purchase had been by one not a party to the action.[268] A bid may sometimes be refused on the ground that the bidder is wholly irresponsible. This must be done only in a very clear case.[269]

In such a case, if an irresponsible party assumes to bid as the agent of another, the officer may inquire respecting his authority to do so, and is justified in refusing the bid, if the authority to make it does not exist.[270]

As a general rule, every person competent to contract has the right to insist on the reception of his bid. If a bid is made and accepted in the lifetime of a bidder it is not annulled or withdrawn by his subsequent death. The contract having been completed in his lifetime, payment may be made or enforced afterward and the appropriate evidence of his purchase executed.[271]

§ 293. Sale must be to the Highest Qualified Bidder.— If the sheriff refuses to receive a bid, and sells the property in disregard of it, the bidder may, by proceedings in equity, vacate the sale, and compel the bidding to be resumed at the point where his bid was refused.[272] Until it is accepted by the officer, the bidder has the right to withdraw his bid,[273] but after its acceptance he is bound thereby, and the officer has no

[268] La Rue v. King, 74 Ia. 288.

[269] Merwin v. Smith, 1 Green Ch. 182; Michel v. Kaiser, 25 La. Ann. 57.

[270] Massey v. Bowles, 99 Ga. 216.

[271] Cronkite v. Buchanan, 59 Kan. 541, 68 Am. St. Rep. 379.

[272] Duffy v. Rutherford, 21 Ga. 363, 68 Am. Dec. 459.

[273] Hibernia S. & L. Soc. v. Behnke, 121 Cal. 339.

Digitized by Google

power to release him therefrom.[274] No one can be the purchaser, at an execution sale, unless he is the highest bidder. A certificate of sale or deed issued to a person shown not to have been a bidder has been pronounced void.[275] On the other hand, it is said that if a judicial sale is made, and subsequently the master conveys the property to a person other than the successful bidder, the grantee having paid more than the amount of the bid, the parties whose title was divested by the sale have no cause of complaint; and that the right to complain is restricted to such successful bidder.[276] So where after a sale was made under execution to the highest bidder, he informed the sheriff that he would not comply with the terms of the sale, and that officer, in turn, informed the plaintiff in execution, who had made the next highest bid, that his bid would be accepted, and the plaintiff assented, and the sheriff thereupon made a return on the execution of a sale to the plaintiff and delivered to him the property, it was held that, though this action was irregular, the sale was not void, but voidable only, and, on a motion to vacate it, that it was necessary for the moving party to establish that the irregularity caused him material injury.[277] If the person to whom the property was sold refuses to complete his purchase by payment of the amount of his bid a resale becomes indispensable. In no event can the bid of the second highest bidder be accepted, and he be treated as the purchaser.[278] Chan-

[274] Norton v. Nebraska L. etc. Co., 35 Neb. 466, 37 Am. St. Rep. 441.

[275] Davis v. McVickers, 11 Ill. 327; Dickerman v. Burgess, 20 Ill. 266; Rice v. Smith, 18 N. H. 369.

[276] Gibbs v. Davies, 168 Ill. 205.

[277] O'Brien v. Davis, 103 Cal. 429.

[278] Swortzell v. Martin, 16 Iowa, 519; Thompson v. McManama,

Digitized by Google

cery directed the sale to be made in such mode as was deemed best for the interests of the parties; but if no special directions were given, it was always understood that the property must be sold to the best bidder at public auction.[279]

§ 293 a. Terms of the Sale, Officer's Control Over.— An officer whose duty it is to make a sale of the property, either under execution or pursuant to a decree in chancery, is vested with a limited authority, and has no power to direct or change the terms of the sale. Those terms are fixed either by law or by specific directions contained in the execution, decree, or order of sale. The sale must ordinarily be for cash only,[280] and the officer has no power to accept anything but an unconditional cash bid.[281] He cannot accept in payment of the bid anything but lawful money, and if he takes the check of the bidder, he is doubtless answerable for the amount thereof if the plaintiff does not choose to accept it in payment.[282] As the plaintiff is the person entitled to the fruits of the sale, he may waive his right to payment in money, and the sheriff may accept payment in such mode as may be satisfactory to the plaintiff.[283] From the unauthorized making of a sale on credit or the giving to the purchaser of time within

2 Disney, 213; Mathews v. Clifton, 13 Smedes & M. 330; contra, Cummings v. MacGill, 2 Murph. 357.

279 Daniell's Ch. Pr., 4th Am. ed., 1267; Desty's Fed. Proc., § 526 a.

280 Foster v. Thomas, 21 Conn. 291; Jones v. Thacker, 61 Ga. 336; Ruckle v. Barbour, 46 Ind. 285; Chase v. Monroe, 30 N. H. 427; Hooper v. Castetter, 45 Neb. 67; Lauer v. Steinbauer, 14 Wis. 75; Griffin v. Thompson, 21 How. 244.

281 Swope v. Ardery, 5 Ind. 213.

282 Mumford v. Armstrong, 4 Cow. 553; Robinson v. Breman, 90 N. Y. 213.

283 Jones v. Loftin, 1 Hawks, 199; Chase v. Monroe, 30 N. H. 427.

Digitized by Google

which to pay his bid two consequences appear to follow: 1. If before any actual payment the defendant tenders to the officer the amount of the execution, he must accept such tender, and its acceptance terminates, or rather, prevents the completion of the sale;[284] and 2. The plaintiff and others entitled to the proceeds of the sale may compel payment thereof by the sheriff, notwithstanding his attempted giving of credit or extension of the time for payment.[285]

If an officer undertakes to impose terms, annex conditions, or make restrictions not warranted by law or the judgment or decree under which he is acting, there can be no doubt that the terms, restrictions, or conditions so attempted cannot be enforced. His unauthorized assumption of authority cannot result in a sale differing in any substantial particular from that sanctioned by his writ or order.[286] What, then, is the legal consequence of a sale attended with his unauthorized assumption of authority? May it be enforced according to the terms under which it was alone authorized to be made, or will the purchaser be released therefrom? He is chargeable with knowledge of the law and of the proceedings under which the sale takes place. Where the sale is judicial, and must thence be reported to, and confirmed by, the court, the terms of the sale as confirmed must be binding on the purchaser. If, in opposition to the confirmation, the purchaser shows that the terms proclaimed or asserted by the officer making the sale are substantially different

[284] Holmes v. Richmond, 19 Hun, 634.

[285] Jones v. Thacker, 61 Ga. 329.

[286] Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125; Hooper v. Castetter, 45 Neb. 67; Howell v. Schenck, 24 N. J. L. 89; Hulenbaugh v. Umbehauer, 3 W. & S. 259; Witherspoon v. Witherspoon, 33 S. C. 223.

Digitized by Google

from those reported to the court or authorized by the writ or decree, the court will generally release him from his bid.[287] If the sale, as reported, is confirmed by the court, the purchaser cannot subsequently insist that its terms were different, or that he was entitled to some privilege, or has acquired some interest, or may enforce some condition not contained in the authorized terms of sale as expressed or implied from the report thereof.[288]

§ 293 b. The Order of Offering Different Parcels.—If several articles of personal property or several parcels of land are subject to sale in satisfaction of a writ, the order in which they are to be offered must, ordinarily, in the absence of some controlling statute, be left to the discretion of the officer charged with the duty of making the sale. The defendant has no absolute right to direct the order of sale of the different parcels, but, as he is deeply interested, suggestions made by him, apparently in good faith, should receive the serious consideration of the officer, and, unless some objection exists, should be followed, and if not, the sale may be vacated if the mode adopted contrary to his request probably resulted to his detriment.[289] In several of the states defendants in execution are, by statute, given the right to direct the order in which several

[287] Black v. Walton, 32 Ark. 321; Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167; Woodward v. Bullock, 27 N. J. Eq. 507; Hayes v. Stidger, 29 N. J. Eq. 296; Veeder v. Fonda, 3 Paige, 94.

[288] Barron v. Mullin, 21 Minn. 376; Gray v. Case, 51 Mo. 463; Mechanics' S. B. & L. A. v. O'Connor, 29 Ohio St. 655; Dresbach v. Stein, 41 Ohio St. 70; Sackett v. Twining, 18 Pa. St. 199, 57 Am. Dec. 599; Cooper v. Borrall, 10 Pa. St. 491; Long v. Weller, 29 Gratt. 352.

[289] King v. Platt, 37 N. Y. 155.

Digitized by Google

articles of personal property or parcels of real estate shall be offered for sale.[290]

Others than the defendant may be interested in the mode of selling property and in the order in which it shall be offered. If he has conveyed or encumbered some of the property, or if he has conveyed or encumbered all of it, but at different times, there is no doubt that equity, if applied to, will require the officer to first offer for sale that which has not been conveyed, or encumbered, and as to the parcels separately conveyed or encumbered, that they shall be offered for sale in an order inverse to that of their conveyance or encumbrance.[291] Whether it is the duty or even within the power of the officer charged with the sale of the property to institute inquiries respecting conveyances or encumbrances thereof subordinate to his lien, for the purpose of ascertaining the equities of the several grantees or holders of junior liens, and so directing the sale as will best respect and least impair their equities, is a question which has received but little, if any, discussion. It is conceded, however, that chancery may compel him to offer the property for sale in harmony with their equities, or may vacate a sale made in disregard thereof.[292] What he may thus be compelled

[290] C. C. P. Cal., § 694; Taylor v. Trulock, 59 Ia. 558.

[291] Reefe v. Bibb, 43 Ala. 519; Stephens v. Clay, 17 Colo. 489, 31 Am. St. Rep. 328; Hind v. Eaton, 28 Ill. 122; Marshall v. Moore, 36 Ill. 321; Moore v. Shurtleff, 128 Ill. 370; Boone v. Clark, 129 Ill. 466; Hahn v. Behrman, 73 Ind. 120; Merritt v. Richey, 97 Ind. 236; Boos v. Morgan, 130 Ind. 305, 3 Am. St. Rep. 237; Massie v. Wilson, 16 Ia. 390; Merchants' N. B. v. Stanton, 55 Minn. 211, 43 Am. St. Rep. 491; La Farge I. Co. v. Bell. 22 Barb. 24; Clowes v. Dickinson, 5 Johns. Ch. 235; Libby v. Tufts, 121 N. Y. 172; Carey v. Folsom, 14 Ohio. 365; Turner v. Flenniken, 164 Pa. St. 469, 44 Am. St. Rep. 624; State v. Titus, 17 Wis. 241.

[292] Ritch v. Eichelberger, 13 Fla. 169; Richey v. Merritt, 108 Ind. 347; Massie v. Wilson, 16 Ia. 390.

Digitized by Google

to do he may doubtless do without compulsion, and perhaps it is correct to say that it is his duty to adopt the rules of courts of equity when advised that their consideration is material to his proper action.[293] His failure to adopt them is, at most, a mere irregularity which does not render the sale void.[294]

§ 294. Whether to be under the Law in Force at the Sale, or at the Making of the Contract.—After an obligation has been created, the laws in regard to the methods of enforcing like obligations may be changed. Two questions then arise: 1. Is the new statute to be considered as being designed by the legislature to operate on pre-existing obligations? and 2. If so designed, can its retroactive operation be permitted without impairing the obligation of contracts? In preceding sections, we have treated of the constitutionality of stay[295] and exemption[296] laws. The general doctrines of the authorities there cited are, no doubt, applicable to the questions to be considered in this section. The law in force at the creation of the contract must, no doubt, govern, so far as substantial rights are involved.[297] The terms of the contract cannot be altered, nor can all remedy for its enforcement be withdrawn; but the law conferring remedies may, no doubt, be changed. While, in practical effect, the contract and the remedy seem so inseparable that we can scarce conceive of a material change in the one which would

293 Ritter v. Cost, 99 Ind. 80.
294 Clark v. Glos, 180 Ill. 556.
295 § 34.
296 § 219.
297 Burton v. Emerson, 4 G. Greene, 393; Coriell v. Ham, 4 G. Greene, 455, 61 Am. Dec. 134; Lancaster Savings Inst. v. Reigart, 8 Pa. L. J. 515.

Digitized by Google

not have a material effect upon the other, yet it must be admitted that the courts are fully committed to a course of decision which permits very considerable changes in the law giving the remedy, and applies these changes to the enforcement of antecedent obligations.[298] Hence, as a general rule, a sale must be conducted, and the rights of the purchaser and others must be determined, by the law in force at the time the sale is made, and not by the law in force when the obligation to be enforced by the sale was created.[299] As already intimated, this rule cannot be enforced where the terms of the contract have been changed, nor where all remedy for enforcing the obligation has been withdrawn. If, after the obligation is entered into, a law is passed allowing defendants in execution a stated period of time in which to redeem their property from forced sale, this new law is deemed to affect the remedy, and not the right, and will be applied to sales under pre-existing contracts.[300] Various other statu-

[298] Knight v. Dorr, 19 Pick. 48; Newkirk v. Chapron, 17 Ill. 344; Bruce v. Schuyler, 4 Gilm. 221; Colby v. Dennis, 36 Me. 9; Oriental Bank v. Freese, 18 Me. 109, 36 Am. Dec. 701; Kingley v. Cousins, 47 Me. 91; Lord v. Chadbourne, 42 Me. 441, 66 Am. Dec. 290; Baugher v. Nelson, 9 Gill, 299, 52 Am. Dec. 694; Wilson v. Hardesty, 1 Md. Ch. 66; Commercial Bank v. Chambers, 8 Smedes & M. 9; Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283; Starkweather v. Hawes, 10 Wis. 125; Read v. Frankfort Bank, 23 Me. 318; Catlin v. Munger, 1 Tex. 598.

[299] Holland v. Dickerson, 41 Iowa, 367; Fonda v. Clark, 43 Iowa, 300; Martin v. Gilmore, 72 Ill. 193; Allen v. Parish, 3 Ohio, 187; Chadwick v. Moore, 8 Watts & S. 49, 42 Am. Dec. 267; Garland v. Brown, 23 Gratt. 173; McCormack v. Rush, 3 Am. Law Reg., N. S., 73; contra, Doe v. Collins, 1 Ind. 24; Morss v. Doe, 2 Ind. 65; Wolf v. Heath, 7 Blackf. 154; Franklin v. Thurston, 8 Blackf. 160.

[300] Heyward v. Judd, 4 Minn. 483; Freeborn v. Pettibone, 5 Minn. 277; Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515; Moore v. Martin, 38 Cal. 428, overruling People v. Hays, otherwise known as Thorne v. San Francisco, 4 Cal. 127, and Seale v. Mitchell, 5 Cal.

Digitized by Google

tory provisions, ameliorating the harshness of pre-existing laws, and tending to prevent the sacrifice of the debtor's property, have been suffered to have a retroactive action.[301] Still, we think it must be conceded that the law of the remedy may be so radically transformed that the courts will refuse to allow it to operate retrospectively. There must be, and there undoubtedly is, a point beyond which the power of the legislature to prejudice antecedent obligations, while assuming only to alter the remedies for their enforcement, cannot be maintained. We have not discovered this point, and are forced to abandon the hope of being or becoming able to describe its precise locality.

§ 295. Of Subdividing a Single Tract into Parcels.— The land on which the officer has levied, and which he has advertised to be sold, may have been usually known and treated as one parcel only. Its value may be considerably in excess of the amount due on the judgment, or it may be so situated that it would sell best if it were subdivided into several parcels. In

401; Patterson v. Cox, 25 Ind. 261; Moor v. Seaton, 31 Ind. 11; contra, Pomeroy v. Bridge, 1 Neb. 462. The cases cited above from the fourth and fifth Minnesota reports seem to us altogether irreconcilable with Carroll v. Rossiter, 10 Minn. 174, which purports to be based upon and to follow them as authority. This question is, we think, finally settled by Barnitz v. Beverly, 163 U. S. 118, reversing Beverly v. Barnitz, 55 Kan. 466, 49 Am. St. Rep. 257. This case involved the applicability of pre-existing mortgages to statutes extending the right to redeem therefrom after a sale under a judgment of foreclosure.

[301] Iverson v. Shorter, 9 Ala. 713; Bartlett v. Lang, 2 Ala. 404; Chadwick v. Moore, 8 Watts & S. 49, 42 Am. Dec. 267; Van Rensselear v. Sheriff, 1 Cow. 501; Coosa R. S. Co. v. Barclay, 30 Ala 120; Wood v. Child, 20 Ill. 209; Holloway v. Sherman, 12 Iowa, 282, 79 Am. Dec. 537; Stone v. Bassett, 4 Minn. 298; Heyward v. Judd, 4 Minn. 483; Garland v. Brown, 23 Gratt. 173; Catlin v. Munger, 1 Tex. 598.

Digitized by Google

either case the officer ought to subdivide the land, where it is susceptible of subdivision; and he ought also to discontinue his sale as soon as he has realized sufficient to satisfy his writ.[302] A sale will sometimes be vacated by bill or motion when the officer has needlessly sold a large amount of property,[303] or defendant may waive this objection after the sale is made on being informed thereof.[304]

But it must be remembered that, with respect to subdividing a large tract into parcels, the officer must exercise his discretion; and, when he has honestly done so, his judgment must generally be regarded as conclusive.[305] The statute of Arkansas declares that "in all sales of real estate under execution, when the tract or tracts to be sold contain more than forty acres, the same shall be divided, as the owner or owners may direct, into lots containing not more than forty, nor less than twenty acres." This statute has been construed as giving an option or privilege to the defendant, which he may exercise or not; and, if he does not, the officer conducting the sale may subdivide the tract to be sold into parcels of such size as his judgment dictates. "If he should commit any abuse of his dis-

[302] Wheeler v. Kennedy, 1 Ala. 292; Cowen v. Underwood, 16 Ill. 22; Stead v. Course, 4 Cranch, 403; McLean Co. Bank v. Flagg, 31 Ill. 290; Gregory v. Purdue, 32 Ind. 453; Berry v. Griffith, 2 Har. & G. 337, 18 Am. Dec. 309; Hewson v. Deygert, 8 Johns. 333; Mevey's Appeal, 4 Pa. St. 80; Drake v. Murphy, 42 Ind. 82.

[303] Shropshire v. Pullen, 3 Bush, 512; Groff v. Jones, 6 Wend. 522, 22 Am. Dec. 545; Aldrich v. Wilcox, 10 R. I. 405; Tiernan v. Wilson, 6 Johns. Ch. 411; Osgood v. Blackmore, 59 Ill. 261. In Kentucky, a sale of more land than is necessary is void in toto. Dawson v. Litsey, 10 Bush, 408.

[304] Thomas v. Thomas, 87 Ky. 343.

[305] National Bank v. Sprague, 20 N. J. Eq. 159; Wright v. Yetts, 30 Ind. 185; Matson v. Sweetzer, 50 Ill. App. 518; Howland v. Pettey, 15 R. I. 608.

Digitized by Google

cretion, the ready remedy is in the hands of the court upon the return of the sale."[306] Whether the statute gives a mere privilege or option to the defendant to have a tract of land subdivided into parcels, or contains a direction to the sheriff to make such subdivision whether requested to do so or not, the statutory command is not so peremptory as to divest the officer of all discretion. Hence, if he fails to sell in the mode designated, his discretion must be questioned in some proceeding to vacate the sale. Otherwise, the sale must be respected as valid.[307]

To have the sale stopped as soon as sufficient is realized to satisfy the writ and to have the property divided and offered in parcels are privileges of the defendant in execution which he may waive either expressly or by silent acquiescence.[308] Where the tract levied upon apparently consists of a single parcel, and the defendant, or any other person interested in the sale and having the right to be considered in determining how it shall be made, wishes it subdivided for the purpose of offering it in parcels, he should, before the sale, prepare and submit to the officer a plan for such subdivision and, having taken no action of that character nor otherwise requested the offering in subdivisions, he will not ordinarily be permitted, after the sale, to urge that it was irregular to sell the property as a whole.[309]

§ 296. Selling Distinct Parcels en Masse.—Where several distinct parcels of real estate, or several articles

[306] Field v. Dortch, 34 Ark. 399; Wellshear v. Kelley, 69 Mo. 343.
[307] Bardeus v. Huber, 45 Ind. 235; Nelson v. Bronnenburg, 81 Ind. 198.
[308] Thomas v. Thomas, 87 Ky. 343; Oppenheimer v. Reed, 11 Tex. Civ. App. 367.
[309] Lennon v. Heindel, 56 N. J. Eq. 8.

Digitized by Google

of personal property, are to be sold, what is called a "lumping sale" can rarely be justified. Such a sale, when objected to in due time, will not be upheld, unless special circumstances can be shown, from which it must be inferred that such sale was either necessary or advantageous. It is sometimes said that such a sale will not be vacated until it is shown to have injured some one.[310] The command of the law that distinct parcels of land shall be offered for sale separately is founded on the assumption that, by so offering them, the best price will probably be secured and the sale not result in the taking from the defendant of any more property than is necessary to satisfy the writ. Where the right to redeem exists for a specified time after the sale, a sale in parcels may facilitate the exercise of this right and enable the defendant to relieve some of the tracts from the sale when he would not be able to redeem the whole. Perhaps the mere violation of the defendant's right to have the sale in parcels may be assumed to have been prejudicial to him when the contest is between him and the plaintiff in the writ, who has become a purchaser at the sale, and a motion to vacate it is promptly made. There is no doubt, however, that a sale en masse may always be sustained by proving that it resulted in the receiving of a higher bid than could have been obtained by a sale in parcels, and when the defendant resorts to equity, he must doubtless assume the burden of proving that the sale as made was inequitable and operated unjustly to him, and this he cannot ordinarily do otherwise than by establishing to the satisfaction of the court that the sale,

[310] Ross v. Mead, 5 Gilm. 171; McMullen v. Gable, 47 Ill. 67; Hicks v. Perry, 7 Mo. 346.

Digitized by Google

in the mode of which he complains, produced less than a sale in parcels would have realized.[311]

Prima facie an officer making a sale should assume, when the property to be sold consists of two or more tracts of land or two or more articles of personalty, that a sale in parcels will be for the benefit of all parties, and he should always endeavor to sell them separately, unless it is clear that they will bring more if offered together.[312] If, in disregard of his duty, he should sell them in "a lump," as one parcel, the sale will be set aside on a seasonable application.[313]

As is suggested in recent decisions, a sale en masse of several parcels of land is more likely to prejudice the plaintiff than the defendant, except in so far as it may interfere with the latter's right of redemption. This is, however, an exceedingly valuable right, and

[311] Hudepohl v. Liberty Hall etc. Co., 94 Cal. 588, 28 Am. St. Rep. 149; Bressler v. Martin, 42 Ill. App. 356; Connecticut M. L. I. Co. v. Brown, 81 Ia. 42; Hopper v. Hopper, 79 Md. 400; Maxwell v. Newton, 65 Wis. 261.

[312] Meeker v. Evans, 25 Ill. 322; Am. Ins. Co. v. Oakley, 9 Paige, 259; Baker v. Chester Gas Co., 73 Pa. St. 116; Benton v. Wood, 17 Ind. 260; Reed v. Carter, 1 Blackf. 410; Tiernan v. Wilson, 6 Johns. Ch. 411; State v. Morgan, 7 Ired. 387, 47 Am. Dec. 329; Anniston P. Works v. Williams, 106 Ala. 324, 54 Am. St. Rep. 51; Wilbanks v. Untriner, 98 Ga. 801; Brown v. Duncan, 132 Ill. 413; Smith v. Huntoon, 134 Ill. 24, 23 Am. St. Rep. 646; Pritchard v. Madren, 31 Kan. 38; Terry v. Swinford (Ky.), 41 S. W. 553; Danneel v. Klein, 47 La. Ann. 928; Power v. Larrabee, 3 N. D. 502, 44 Am. St. Rep. 577; Hart v. Hines, 10 App. D. C. 366.

[313] Rowley v. Brown, 1 Binn. 61; Ryerson v. Nicholson, 2 Yeates, 516; San Francisco v. Pixley, 21 Cal. 56; Cunningham v. Cassidy, 17 N. Y. 276; Graham v. Day, 4 Gilm. 389; Grapengether v. Fejervary, 9 Iowa, 163, 74 Am. Dec. 336; Bradford v. Limpus, 13 Iowa, 424; Boyd v. Ellis, 11 Iowa, 97; White v. Watts, 18 Iowa, 75; Browne v. Ferrea, 51 Cal. 552; King v. Tharp, 26 Iowa, 283; Johnson v. Hovey, 9 Kan. 61; Laughlin v. Schuyler, 1 Neb. 409; Hicks v. Perry, 7 Mo. 346; Jackson v. Newton, 18 Johns. 356; Bell v. Taylor, 14 Kan. 277. After eleven years have elapsed, it is too late to object that the sale was made en masse. Wood v. Young, 38 Iowa, 103.

Digitized by Google

any interference with or impairment of it must be presumed to have been prejudicial to the defendant. If he moves with reasonable diligence to vacate the sale, the motion must be granted, because it will not be possible to prove that the right of redemption has not been diminished in value. "Where there is a sale in parcels for an inadequate price, the right of redemption is a sufficient protection against sacrifice, but where the right of redemption is interfered with by selling several parcels in a lump, then it is the duty of the court to set aside the sale, unless the purchaser can show that no possible injury with respect to his redemption right could have resulted to defendant by the disregard of the statute requiring sale in separate parcels." [314]

[314] Power v. Larrabee, 3 N. D. 502, 44 Am. St. Rep. 577. The court fully disclosed the grounds of its decision, in the following language: "But in so far as a sale in lump interferes with the defendant's right to redeem any particular parcel or parcels, and compels him to redeem property which may not be worth redeeming, and, in order to redeem the parcels of value, to pay something additional on account of the necessity of redeeming that which may not be profitable for him to redeem, the duty of the sheriff to sell in separate parcels is absolute. Two parcels of land are sold, one valuable to the owner, the other mortgaged for all it is worth. If sold in a lump, it is impossible to tell how much of the price was bid for the parcel worth nothing to the defendant. The exercise of the right of redemption, therefore, affords him no adequate protection. By reason of the sheriff's failure to obey the statute, the defendant in such a case, if he cannot have the sale set aside, must pay what is bid for both the worthless and the valuable parcel, and redeem both, when it would be profitable for him to redeem only one. But if it should appear that the smaller parcel sold was worth more than the total price bid for the whole property, then it would be clear that the defendant had not been prejudiced by the sale in a lump, because it would be profitable for him to redeem such smaller piece by the payment of the total price bid for the whole; and it would be still more profitable for him to be able to redeem at the same time, and in addition, all the other parcels for the same sum."

Digitized by Google

What is to be regarded as a seasonable application for relief from a sale en masse has not been very frequently discussed; and no doubt, when it shall have been so discussed, the conclusions reached in the different states will not be entirely uniform. Where the property sold is subject to redemption within a stated time, it has been held, and we think justly, that the motion to vacate must, in ordinary cases, be interposed before the expiration of such time.[315] The defendant may seek to excuse his laches in not promptly moving on the ground that he was for a long time without knowledge of the manner in which the sale was made. Then the question will arise whether his want of such knowledge is consistent with a reasonable attention to his own business. For, manifestly, his right to relief cannot be prolonged by his willfully or carelessly closing his eyes, in order that he may not see that of which he now complains. If he knows of the levy of the execution or the advertisement of sale, then, as a reasonably prudent man, it is his duty to advise himself of the subsequent sale and the mode of conducting it; and he cannot indefinitely prolong his right to vacate the sale by remaining ignorant of the existence of the grounds for such vacation.[316] He may, however, even in such circumstances, disclose the reasons for his inaction and how it was that he was led to believe that his interests were not in peril, and, having fully satisfied the court upon this subject and thereby explained his apparent laches, he will be awarded relief.[317]

[315] Raymond v. Holborn, 23 Wis. 57, 99 Am. Dec. 105; Raymond v. Pauli, 21 Wis. 531; Love v. Cherry, 24 Iowa, 210.

[316] Vigoureux v. Murphy, 54 Cal. 346.

[317] Berry v. Love, 167 Ill. 612; Lurton v. Rodgers, 189 Ill. 554, 32 Am. St. Rep. 214.

Digitized by Google

Instances have occurred in which such sales were vacated by bill in equity after the lapse of several years, as against the plaintiff in the execution,[318] and even as against a stranger purchasing at the sale.[319] While there may doubtless be instances in which a delay of two or three years, or even of a longer period, is not fatal to the complainant,[320] yet we apprehend that his claim to equitable relief must be grounded upon something more than the irregularity in the sale and his subsequent inattention to his own business. He must show why he did not resort to his remedy by motion, and why he so long delayed action by independent suit.[321] No doubt, the right to vacate a sale on this ground may be waived by parol,[322] or barred by delay in proceeding.[323] In truth, though the statute of the state expressly commands the officer to sell in parcels, the requirement is generally construed to be directory only. If the owner is present at the sale, and does not ask for any division of the property or any sale in parcels, nor otherwise object to the mode of selling, this silence on his part seems to be equivalent to an express agreement that the sale may be made without pursuing the directions of the statute upon the subject.[324]

The vacating of the sale may be accomplished by a

[318] Williams v. Allison, 33 Iowa, 278.

[319] Morris v. Robey, 73 Ill. 462.

[320] Fergus v. Woodworth, 44 Ill. 374.

[321] Vigoureux v. Murphy, 54 Cal. 346.

[322] Vilas v. Reynolds, 6 Wis. 214; Smith v. Randall, 6 Cal. 52, 65 Am. Dec. 475; Hudepohl v. Liberty Hill W. etc. Co., 94 Cal. 588, 28 Am. St. Rep. 149.

[323] Roberts v. Fleming, 53 Ill. 196.

[324] Youngblood v. Cunningham, 38 Ark. 571; Reynolds v. Tenant, 51 Ark. 84.

Digitized by Google

bill in equity.[325] In fact, while the right to vacate a sale to the plaintiff by motion in the original case is conceded, it has sometimes been determined, when a stranger to the writ purchases, or when the purchase is made by the plaintiff, but he assigns to a stranger, that relief must be sought in equity.[326] We are inclined to doubt both the necessity and the correctness of this rule. It seems to be settled that innocent vendees of the original purchaser will always be protected,[327] whether proceeded against by bill or motion. A proceeding to vacate a sale because it was made in the lump, instead of by parcels, must, therefore, to be of any availability, be prosecuted by the defendant against the original purchaser, or a vendee of such purchaser, charged with notice of the irregularity in the sale. The proceeding is not based upon any actual fraud, nor is it of so complicated a character that it cannot, unless in very extreme cases, be fully investigated and properly determined on the hearing of a motion made in the case in which the writ issued. There is, therefore, no sufficient reason for compelling a resort to some independent suit.

We have so far, in the present section, proceeded upon the theory that sales en masse, though voidable, are not void. This, we believe, necessarily follows from the fact that a person who deems himself prejudiced thereby may move for their vacation, and, by his failure to do so, he ratifies them and precludes himself

[325] Aldrich v. Wilcox, 10 R. I. 405; Cowen v. Underwood, 16 Ill. 22; Morris v. Robey, 7 Chic. L. N. 376; Douthett v. Kettle, 104 Ill. 356.

[326] Day v. Graham, 1 Gilm. 435.

[327] Mixer v. Sibley, 53 Ill. 61; Nelson v. Bronnenberg, 81 Ind. 193.

Digitized by Google

and others from insisting that they are void.[328] It is true that there are several decisions that do not conform to this view. Such sales are declared absolutely void in Tennessee.[329] In Minnesota a sale of two tracts en masse, one of which was a homestead, was pronounced void as against the homestead, because it was exempt, and as against the other tract, because the sale of the two tracts as one interfered with the right of redemption of the tract which was subject to the sale.[330] Early decisions in Michigan indicated that sales en masse were void in that state,[331] but it is now settled that they are not there subject to collateral attack.[332] In Indiana there has been much judicial vacillation on this subject. At first such sales were pronounced void;[333] next they were declared voidable only;[334] after this they were again adjudged absolutely void;[335] but finally the rule in force in a majority of the states was again—and, we trust, permanently—adopted.[336] In Pennsylvania a lumping

[328] Gregory v. Bonel, 77 Cal. 132; Marston v. White, 91 Cal. 46; Hudepohl v. Liberty Hall W. Co., 94 Cal. 592, 28 Am. St. Rep. 149; Palmer v. Riddle, 180 Ill. 461; Lewis v. Whitten, 112 Mo. 318; Power v. Larrabee, 3 N. D. 502, 44 Am. St. Rep. 577.

[329] Mays v. Wherry, 2 Baxt. 133; Cooke v. Walters, 2 Lea, 116; Winters v. Burford, 6 Cold. 328.

[330] Mohan v. Smith, 30 Minn. 259.

[331] Lee v. Mason, 10 Mich. 403; Udell v. Kahn, 31 Mich. 197.

[332] Hoffman v. Buschman, 95 Mich. 538.

[333] Sherry v. Nick of the Woods, 1 Ind. 575; Doe v. Smith, 4 Blackf. 228; Reed v. Diven, 7 Ind. 189; Banks v. Bales, 16 Ind. 423.

[334] West v. Cooper, 19 Ind. 2, and Patton v. Steuart, 19 Ind. 233.

[335] Piel v. Brayer, 30 Ind. 332, 95 Am. Dec. 699; Tyler v. Wilkerson, 27 Ind. 450; Gregory v. Purdue, 32 Ind. 453; Voss v. Johnson, 41 Ind. 19; Bardeus v. Huber, 45 Ind. 235; Catlett v. Gilbert, 23 Ind. 614.

[336] Jones v. Kokomo B. Assn., 77 Ind. 340; Nelson v. Bronnenburg, 81 Ind. 193.

Digitized by Google

sale of chattels has been treated as void.[338] Later decisions indicate that such a sale is void, or not, according to the circumstances. "Whenever, in fact, the sale is honest and fair, and the parties to the execution request it to be sold that way, and no one desiring to bid asks to have it sold otherwise, the sale cannot be declared void."[339]

The decided preponderance of the authorities on this subject shows that a third person cannot object to a sale en masse,[340] and that, when the person entitled to complain does not do so by some appropriate proceeding, the sale is impregnable to any collateral assault, and must be treated as valid.[341] If the sale is judicial, and must therefore be reported to and confirmed by the court, the objection that two or more parcels which were sold together ought to have been sold separately must be suggested as a cause for denying the confirmation. It cannot subsequently be available as a ground for overthrowing the sale; for by the confirmation the sale has received a judicial sanction,

[338] Klopp v. Witmoyer, 43 Pa. St. 219, 82 Am. Dec. 561; Breeze v. Bange, 2 E. D. Smith, 493.

[339] Smith v. Meldren, 107 Pa. St. 348; Yost v. Smith, 105 Pa. St. 628; Furbush v. Greene, 108 Pa. St. 508.

[340] Stephens v. Baird, 9 Cow. 274.

[341] Reanda v. Fulton, 8 Pac. L. Rep. 70; Bunker v. Rand, 19 Wis. 253, 88 Am. Dec. 684; San Francisco v. Pixley, 21 Cal. 56; Williams v. Allison, 33 Iowa, 278; Johnson v. Hovey, 9 Kan. 61; Tillman v. Jackson, 1 Minn. 183; Evans v. Wilder, 5 Mo. 313; Rector v. Hartt, 8 Mo. 448, 41 Am. Dec. 650; Fine v. St. Louis Public Schools, 30 Mo. 166; Mohawk Bank v. Atwater, 2 Paige, 54; Cunningham v. Cassidy, 17 N. Y. 276; Doe v. Hodges, 3 Hawks, 51; Huggins v. Ketchum, 4 Dev. & B. 414; Griswold v. Stoughton, 2 Or. 61, 84 Am. Dec. 409; Bouldin v. Ewart, 63 Mo. 330; Foley v. Kane, 53 Iowa, 64; Bell v. Taylor, 14 Kan. 277; Smith v. Scholtz, 68 N. Y. 41; Lamberton v. Merchants' Bank, 24 Minn. 281; Vigoureux v. Murphy, 54 Cal. 346.

Digitized by Google

of which it can be divested only by some revisory proceeding.[342]

Instances occasionally occur in which a sale en masse is not only proper, but indispensable. Thus, where several parcels of real estate, or several articles of personal property, are subject to the same mortgage, the equity of redemption, being indivisible, cannot be subdivided by separate sales of the various articles or parcels.[343] Of course, this rule does not apply where the sale is made under and by virtue of a foreclosure of the mortgage.[344] If, after the execution of a mortgage on two parcels of land, the mortgagor conveys them to different persons, the equity of redemption is thereby divided by his voluntary act, and a creditor proceeding by execution need not include both tracts in one sale.[345] "Two distinct equities of redemption in different parcels of land under mortgages to different persons cannot be sold together on an execution against the mortgagor." [346]

Whether a tract of land constitutes several parcels cannot be ascertained merely by reading a description of it. It may consist of parcels known by different names or numbers; it may have formerly been the property of different owners, from whom the defendant acquired it by separate purchases, and yet, if the tracts are contiguous, he may have so improved and occupied them as to unite them into one tract. If so, a sale of the tract, by its original parcels, is not re-

[342] Osman v. Traphagem, 23 Minn. 80.

[343] Tifft v. Barton, 4 Denio, 171; Cotton v. Marsh, 3 Wis. 221; Harvey v. McAdams, 32 Mich. 472; Locke v. Shreek, 54 Neb. 472.

[344] Baker v. Chester Gas Co., 73 Pa. St. 116; Shannon v. Hay, 106 Ind. 589; Webster v. Foster, 15 Gray, 31; Cochran v. Goodell, 131 Mass. 464; Plimpton v. Goodell, 143 Mass. 365.

[345] North v. Dearborn, 146 Mass. 17.

[346] McCone v. Courser, 64 N. H. 506.

Digitized by Google

quired, and is manifestly improper.[347] So, real and personal property may be used together for the purpose of carrying on a single business, as where the same person owns a hotel and the furniture and fixtures used therein for carrying on the hotel business. If so, an officer must sell both the real and personal property as a unit when he is acting under a decree foreclosing a mortgage including both, especially where none of the apparently interested parties object to the sale when made.[348]

The rule that distinct parcels should be separately sold is not generally enforced to the extent of denying the right to sell when the sale can be made in no other way. Hence, the officer, after offering the parcels separately, and in various combinations, without receiving any bids, may then offer and sell them en masse.[349] In Illinois if three or more parcels of land are to be sold under execution, and the sheriff offers them separately without being able to make a sale, he is not at once entitled to sell all en masse. He should next offer two parcels together, to ascertain whether bidders cannot be obtained for them, and if, without doing this, he

[347] Gleason v. Hill, 65 Cal. 17; Craig v. Stevenson, 15 Neb. 362; Stephens v. Taylor, 6 Lea, 307; Eaton v. Ryan, 5 Neb. 47; Geney v. Maynard, 44 Mich. 578; Anderson v. Austin, 34 Barb. 319; Yale v. Stevenson, 58 Mich. 537; Howland v. Petty, 15 R. I. 603; Hammett v. Farmer, 26 S. C. 566; New Orleans v. Peake, 52 Fed. Rep. 74; Smith etc. Co. v. Weiss, 56 Neb. 210.

[348] Worth v. Newlin (N. J. Ch.), 36 Atl. 30.

[349] Mugge v. Helgemeir, 81 Ind. 120; Weaver v. Guyer, 59 Ind. 195; Hill v. F. & M. N. B., 97 U. S. 450; Van Valkenburg v. Trustees, 66 Ill. 103; Ollis v. Kirkpatrick, 2 Idaho, 976; Bressler v. Martin, 42 Ill. App. 356; Cohen v. Menard, 136 Ill. 130; Connecticut M. L. I. Co. v. Brown, 81 Ia. 42; Lamb v. McConkey, 76 Ia. 47; Nix v. Williams, 110 Ind. 234; Deadwood F. N. B. v. Black Hills F. Asso., 2 S. Dak. 145; White v. Crow, 110 U. S. 113.

Digitized by Google

offers all at once, the resulting sale may be vacated.[350] In the cases in which this ruling was made the sales in question were so grossly and strikingly inadequate that the court was anxious to discover some ground for annulling them. Hence, we doubt whether the ruling is applicable where there are no special circumstances of hardship and unfairness. In Michigan, the rule is otherwise. If the parcels will not sell separately, they must not be sold at all. The creditor has an absolute right to have them so sold that he may redeem any one of them without being compelled to redeem the others.[351]

§ 297. Of Combinations and Other Devices to Prevent Competition.—Execution sales are required to be made at public auction, and, after due notice, in order that competition may be produced, and the property of the debtor be sold at its market value. Anything which tends to prevent this competition is likely to produce a sacrifice of the interests of the debtor, and perhaps of both debtor and creditor. It is also against public policy, and highly immoral, and whenever discovered will be stamped with marks of disapproval, both at law and in equity. Any agreement made between two or more persons to avoid or reduce competition at an execution or judicial sale is treated as fraudulent and void. If either of the parties appeals to a court of law to enforce rights based upon or growing out of such agreement, the appeal will be disregarded. The law will not assist him to harvest the anticipated fruits of his immoral and unlawful compact.[352] Therefore, if

[350] Cohen v. Menard, 31 Ill. App. 503; Douthett v. Kettle, 104 Ill. 356.

[351] Udell v. Kahn, 31 Mich. 197.

[352] Troupe v. Wood, 4 Johns. Ch. 228; Thompson v. Davies, 13 Johns. 112; Packard v. Bird, 40 Cal. 378; Spencer v. Champion, 13

Digitized by Google

two persons, as judgment creditors or otherwise, have a lien on the property of the same defendant, and one of them agrees with the other that if he will not bid at the sale and will let the property be struck off to the latter, he will pay the judgment of the former, no action can be sustained upon such agreement.[353] If it can ever be sustained and enforced, it can only be when the person whose property is offered for sale knows of, and assents to, the arrangement thus entered into between his creditors.[354]

It does not necessarily follow, because one person bids for the benefit of himself and others, or because two or more persons join their capital for the purpose of making a purchase at such sale, that there has been an unlawful or fraudulent combination. There are occasional instances in which the value of the property sold is so great that but few persons in the neighborhood are possessed of the means requisite for its purchase, and in which competition would be diminished rather than increased by prohibiting the aggregation of capital. Other instances frequently occur in which two or more persons may lawfully unite in making a purchase. In fact, the union of two or more persons in purchasing at an execution sale seems never to be condemned, unless the court conceives that its object is to prevent competition, rather than to engage in the

Conn. 19; Hook v. Turner, 22 Mo. 333; Hawley v. Cramer, 4 Cow. 717; Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678; Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706; Meech v. Bennett, Hill & D. 191; Johnston v. La Motte, 6 Rich. Eq. 347; Jones v. Caswell, 3 Johns. Cas. 29, 2 Am. Dec. 134; Doolin v. Ward, 6 Johns. 194.

[353] Goldman v. Oppenheimer, 48 Ind. 95; Barton v. Benson, 126 Pa. St. 431, 12 Am. St. Rep. 883; Hays' Estate, 159 Pa. St. 381; Phelps v. Benson, 161 Pa. St. 418; Dudley v. Odom, 5 S. C. 131, 22 Am. Rep. 6.

[354] Moffit v. Ijams, 108 Pa. St. 266.

Digitized by Google

joint prosecution of an honorable business enterprise.[355] The intent of the combination controls; and where there is an absence of the evil intent of suppressing competition, the combination is regarded as innocuous. The absence of this intent is the more readily credited when the persons combining have pre-existing interests to be protected, as where they have liens upon the property to be sold. In that event they may unquestionably appoint one of their number to attend the sale and to bid on behalf of all. "An agreement made by parties, one or more of whom has a lien upon or an interest in the property about to be disposed of at a public or judicial sale, is not against public policy because it has the effect to prevent competition at such sale, provided it was made, not with the intent of producing that effect, but was fairly made to protect the lien or interest of the parties, or for any other reasonable and lawful purpose."[356] There is no impropriety where several persons claim lands or are interested therein as tenants in common in their agreeing that one of them shall bid for all at an execution or judicial sale of the property.[357] This must necessarily be so, for, if there were no previous agreement, one could not act in hostility to the others, and if he bid, intending to act for himself alone, the others would be entitled to

[355] Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Phippen v. Stickney, 3 Met. 388; Smull v. Jones, 1 Watts & S. 128; Switzer v. Skiles, 3 Gilm. 529, 44 Am. Dec. 723; Buckner v. Chambliss, 30 Ga. 652; Young v. Smith, 10 B. Mon. 293; Stewart v. Severance, 43 Mo. 322, 97 Am. Dec. 392; Bradley v. Kingsley, 43 N. Y. 534; Slingluff v. Eckel, 24 Pa. St. 472; Gardiner v. Morse, 25 Me. 140; Brisbane v. Adams, 3 N. Y. 129; Young v. Snyder, 3 Grant Cas. 151; Gulick v. Webb, 41 Neb. 706, 43 Am. St. Rep. 720; Branden v. O'Neil, 183 Pa. St. 462, 63 Am. St. Rep. 761; Olson v. Lamb, 56 Neb. 104.

[356] Myers v. Dorman, 34 Hun, 115; Capital Bank v. Huntoon, 35 Kan. 588; National Bank v. Sprague, 20 N. J. Eq. 159.

[357] Reagan v. Bishop, 25 S. C. 585.

Digitized by Google

the benefit of his purchase on condition of sharing its burdens.[358]

Whether a combination is fraudulent, even where the parties have no prior lien or interest to protect, must be determined from all the circumstances of the case. "It is not every joint bidding, or partnership among bidders, at a sale under a decree in chancery, that is corrupt and fraudulent. Such joint or partnership biddings may be perfectly legitimate. To render them unlawful and void, there must be a fraudulent intent to depress and chill the sale to obtain the property at an undue value, or to obtain other undue and unconscientious advantages. An estate might be offered for sale which neither of two bidders would be able, separately, to purchase, or, it might be that neither of the joint bidders, though able as to pecuniary means, would desire to purchase the whole of the estate offered for sale, though each would be desirous to become the owner of a part. Such persons, if not permitted to unite in their biddings, would not enter into the competition at all. To adopt so stringent a rule as that contended for, in reference to sales in chancery, would, in many instances, have the effect of diminishing instead of enhancing the prices. If the copartnership in bidding appears, from the attendant circumstances, to have been entered into with a fraudulent intent to depress and chill the sales, and to obtain undue advantages in the purchase of property, the sale will be vacated. If such joint bidding has no such fraudulent intent, and is bona fide, it will not have the effect of vitiating the sale." [359]

[358] Freeman on Cotenancy and Partition, §§ 154 to 156.

[359] Holmes v. Holmes, 3 Rich. Eq. 61; Smith v. Greenlee, 2 Dev. 128, 18 Am. Dec. 564; Gulick v. Webb, 43 Neb. 706, 43 Am. St. Rep. 720; Braden v. O'Neil, 183 Pa. St. 462, 63 Am. St. Rep. 761.

Digitized by Google

No doubt the permission of the combination of purchasers, under any circumstances, or for any purpose, introduces a very embarrassing issue into every proceeding to avoid a sale for alleged unlawful combination, and renders it possible for the persons whose motives are assailed to protect themselves by statements and explanations more consistent with their interests than with truth. As business transactions are commonly dominated by the desire of self-aggrandizement, a combination, the apparent purpose and result of which are to reduce the number of competitors, may most reasonably be imputed to an intent to depress the sale and acquire the property at an undervalue. We therefore think that every confederation of purchasers should be presumed fraudulent, and that this presumption ought to prevail, except against the most clear and convincing evidence to the contrary.

Competition may be reduced or prevented by many devices other than combination among the bidders. False statements may be made concerning the title or value of the property, the time of the sale, the validity of the proceedings, or the purposes in view of which a bid is made. Thus, a bidder may cause the bystanders to believe that he is acting through motives of philanthropy toward the defendant or his family, and may thus prompt them to refuse to participate in the biddings. The mode by which competition is prevented is immaterial. The guilty party will not be allowed to retain the benefit of his chicanery. "If the purchaser, at a sheriff's sale either alone or by concert with the officer, does any act in relation to the sale which is calculated to prevent full and free competition in bidding, by reason of which the property sells at an undervalue, the sale will be set aside as fraudu-

Digitized by Google

lent." Hence, if notice is given at a sale of shares of stock in a corporation questioning the title of the judgment debtor, and the sheriff, though such notice is not addressed to him, reads it in the presence of the attending bidders, and declares that, because of it, he is unable to offer any specific number of shares, but must merely sell the defendant's right, title, and interest in shares of stock in the corporation, a sale made under these circumstances must be set aside.[360] If a person has a valid claim, or one believed to be valid, to which a judicial or execution sale is subject, it is not improper for him to so state before the sale takes place, and his statement does not forbid his becoming a purchaser of the property nor require the court, on application, to set aside the sale.[361] If the defendant in execution makes a statement preceding the sale impeaching his title or questioning the validity of the judgment or process under which the sale is to be made, and thereby causes a sale of his property at an inadequate price, it will not be vacated at his instance. He must suffer the consequences of his own wrong.[362] Any statement made by an intending bidder, though strictly true, if its purpose is to prevent competition, furnishes a sufficient reason for vacating a sale,[363] as where the defendant in execution announces her intention to bid, declares that she is a widow dependent on the premises to be sold for her support, and requests that no one bid against her, and thereby causes persons to refrain from bidding.[364] This rule cannot be

[360] Jones v. Portsmouth etc. R. R. Co., 32 N. H. 544.

[361] Reagan v. Bishop, 25 S. C. 585.

[362] O'Kelley v. Gholston, 89 Ga. 1; Collins v. Smith, 75 Wis. 392.

[363] De Grauw v. Mechan, 48 N. J. Eq. 219; Barrett v. Bath P. Co., 13 S. C. 128.

[364] Herndon v. Gibson, 38 S. C. 357, 37 Am. St. Rep. 765.

Digitized by Google

applied to a truthful notice of an adverse claim given immediately preceding an execution sale, though it may have the effect of chilling the bidding, and the person giving the notice becomes the purchaser of the property. Speaking of such a notice and purchase, the court said, "So far as we can discover she did no more than is often done, and properly done—gave notice at the sale that she held a title for that land, which was true. Indeed, she did no more than give actual notice of a fact of which the public had already constructive notice by reason of the fact that her deed had been duly recorded. This, so far from being objectionable, was rather commendable, as it tended to prevent an unwary bidder from buying a lawsuit."[365] While a judicial sale was in progress, one bidder induced another to refrain from further bidding on the promise to convey to the latter the portion particularly desired by him, and then entered into an arrangement with another bidder that, whichever had the property struck off to him, the other should have the option to take it off his hands and pay a specified bonus. The sale finally consummated was for less than the market value. The sale was set aside in equity.[366] If the

[365] Leake v. Anderson, 43 S. C. 448.

[366] Ingalls v. Rowell, 149 Ill. 163. Speaking of the agreement that the person whose bid was accepted should convey the property to the other on the payment of a bonus, the court said: "The arrangement between Stevens and Ingalls involves somewhat different principles, but leads to the same result. They were both bidders, and were bidding in competition, and so continued until the bidding had proceeded to a considerable length. The practical result of the agreement between them was, that each ceased to be a competitor of the other. Under that agreement, if either desired to secure the land for himself, his only sure way was not to bid against the other, but to let it be struck off to him, and then exercise his option of paying two hundred dollars and taking the property off his hands. As against all other bidders, the two, from that time

Digitized by Google

property of a corporation is about to be sold under execution through the procurement of its officers, in violation of their duties as such, and one of them further attends at the sale and depresses the bidding by falsely stating that the property is his, no sale made to him or in his interest can be enforced against the corporation.[367]

In every case in which a sale has been infected by any fraudulent combination or any device to depress the bidding, it will be vacated on proper proceedings instituted for that purpose.[368] The purchase cannot, however, in any state be treated as fraudulent solely because accompanied with some of the indicia of fraud. Thus, if it appears that a purchase is made by one person at a judicial sale attended by an agreement between him and another that the latter shall not bid thereat, this transaction cannot be pronounced fraudulent nor the purchase void as a matter of law, but the question whether the arrangement between the parties was fraudulent or not must be submitted to the jury,

forth, stood as one bidder, the competition of the other being wholly withdrawn. It is manifest that such an arrangement had a direct tendency to stifle competition, and that such was both its intention and effect there can be no doubt."

[367] Pekin M. etc. Co. v. Kennedy, 81 Cal. 356.

[368] Forelander v. Hicks, 6 Ind. 448; Vantress v. Hyatt, 5 Ind. 487; Griffith v. Judge, 49 Mo. 536; White Crow v. White Wing, 3 Kan. 276; Stockton v. Owings, Litt. Sel. Cas. 256; Stewart v. Nelson, 25 Mo. 309; Stewart v. Severance, 43 Mo. 322, 97 Am. Dec. 392; Jones v. P. & C. R. R., 32 N. H. 544; Miltenberger v. Morrison, 39 Mo. 71; Hamilton v. Hamilton, 2 Rich. Eq. 355, 46 Am. Dec. 58; Carson v. Law, 2 Rich. Eq. 296; Hamburg M. Co. v. Edsall, 1 Halst. Ch. 249; Edsall v. Hamburg M. Co., 1 Halst. Ch. 658; Fleming v. Hutchinson, 36 Iowa, 519; Wooton v. Hinkle, 20 Mo. 290; Seymour v. M. & C. T. Co., 10 Ohio, 476; Mills v. Rogers, 2 Litt. 217, 13 Am. Dec. 263; Pattison v. Josselyn, 43 Miss. 373; Arnold v. Cord, 16 Ind. 177; Martin v. Blight, 4 J. J. Marsh. 491, 20 Am. Dec. 226.

Digitized by Google

and if they find that there was no fraud in fact, the sale must be sustained.[369]

These proceedings are sometimes by motion. But a suit in equity is better adapted for the investigation and decision of the issues necessarily involved.[370] Whether a purchase obtained by the prevention of competition can by the guilty party be asserted at law, is a question upon which the courts are by no means agreed. In several of the states, such a purchase, and the deed made in pursuance thereof, are regarded as a valid transfer of the legal title.[371] The defendant in execution, wishing to prevent the assertion of this title, must claim the assistance of a court of equity. But the majority of the decisions sustains an adverse theory—one under which the title of the fraudulent purchaser is, while in his hands, regarded as void, and therefore as capable of being resisted not less successfully at law than in equity.[372]

[369] Woodruff v. Warner, 175 Pa. St. 302. 52 Am. St. Rep. 845.

[370] Slater v. Maxwell, 6 Wall. 268; Dudley v. Little, 2 Ohio, 504; Cocks v. Izard, 7 Wall. 559.

[371] Crews v. First Nat. Bank, 77 N. C. 110; Love v. Powell, 5 Ala. 58; Costillo v. Thompson, 9 Ala. 937; Myers v. Sanders, 7 Dana, 507; Taylor v. King, 6 Munf. 366, 8 Am. Dec. 746; Hill v. Whitfield, 3 Jones, 120. See, also, the authorities in the preceding citation.

[372] Jones v. P. & C. R. R., 32 N. H. 554; Fuller v. Abrahams, 3 Brod. & B. 116; 6 J. B. Moore, 316; Brodie v. Seagraves, 1 Tayl. 144; Crary v. Sprague, 12 Wend. 41, 27 Am. Dec. 110; Hogg v. Wilkins, 1 Grant Cas. 67; Underwood v. McVeigh, 23 Gratt. 409; Martin v. Ranlett, 5 Rich. 541, 57 Am. Dec. 770; Kerwer v. Allen, 31 Iowa, 578; Aldrich v. Maitland, 4 Mich. 205; Abbey v. Dewey, 25 Pa. St. 416; Fleming v. Hutchinson, 36 Iowa, 519; Phelps v. Benson, 161 Pa. St. 418; Goble v. O'Connor, 43 Neb. 49; Barton v. Hunter, 101 Pa. St. 406; Oram v. Rothermel 98 Pa. St. 300. In North Carolina, the sale is valid at law until set aside, except when there is a fraudulent collusion and combination between the purchaser and the officer conducting the sale, in which case the sale is void. Burton v. Spiers, 92 N. C. 503.

Digitized by Google

§ 298. Employing Puffers at the Sale.—Combinations at execution sales to depress the bidding defraud either the plaintiff or the defendant, with a view of promoting the interests of the purchaser. Devices or combinations to unduly stimulate the bidding have an opposite effect. They subserve the interests of the plaintiff or the defendant, and operate as a fraud upon the purchasers. In the first case the purchaser may, as we have shown, be deprived of the fruits of his unlawful and immoral device, either by vacating the sale, or by treating it as void. In the second case the purchaser may escape the consequence of the fraud practiced upon him by seeking a release from his bid. Puffers at execution and judicial sales seem to have been rarely employed, or, if not rarely employed, at least to have been rarely discovered. But few applications have been made by purchasers seeking to be released from bids made at such sales on the ground that they were induced by puffers. From the few cases in which such releases have been sought, we infer that execution,[373] chancery,[374] and probate[375] sales are, in this respect, governed by the rules applicable to auction sales. With respect to auction sales there is some contrariety of opinion concerning the purchaser's rights, where he can show that puffing has been resorted to. The practice of employing puffers is everywhere condemned; and in ordinary circumstances it is sufficient to justify a court in refusing to compel the purchaser to comply with his bid.[376] But the ma-

[373] Donaldson v. McRoy, 1 Browne, 346; Lee v. Lee, 19 Mo. 420.

[374] Dimmock v. Hallett, L. R. 2 Ch. 21; National Bank v. Sprague, 20 N. J. Eq. 159.

[375] Pennock's Appeal, 14 Pa. St. 446.

[376] Veazie v. Williams, 3 Story, 611, 8 How. 134; Story's Eq. Jur., § 293; Moncrieff v. Goldsborough, 4 Har. & McH. 181, 1 Am. Dec.

Digitized by Google

jority of the courts have probably cast aside the safe and sure rule by which all puffing would be inhibited, and have established in its place other rules, under which the object and the effect of the puffing become material subjects of inquiry in each case. In the first place, it seems that a person whose property is about to be sold at auction may determine that it shall not be sacrificed, and may fix a price below which no sale shall be made, and may secretly employ a person to attend the sale and bid up to the price fixed. The courts have declared this device not to be immoral, because they say its object is to prevent a sacrifice, and not to dispose of property at an exorbitant price under the stimulus of a fictitious bidding.[377] According to the English chancery practice, "where it is desirable to have a reserved bidding appointed by the master, for the purpose of preventing an estate from being sold at an undervalue, the proper course is to apply to the court, by motion, for such a direction, when an order will be made for the master to fix a reserved bidding, if he should see fit." A valuation of the estate is then obtained from a skillful surveyor, who, in his report, sets forth "the amount of the rental, the estimated value of the whole estate, and of each lot separately,

407; Baham v. Bach, 13 La. 287, 33 Am. Dec. 561; Woods v. Hall, 1 Dev. Eq. 411; Nat. Fire Ins. Co. v. Loomis, 11 Paige, 431; Pennock's Appeal, 14 Pa. St. 446; Staines v. Shore, 16 Pa. St. 200, 55 Am. Dec. 492; Towle v. Leavitt, 3 Fost. 360, 55 Am. Dec. 195; Morehead v. Hunt, 1 Dev. Eq. 35; Benjamin on Sales, §§ 470, 474.

[377] Smith v. Clark, 12 Ves. 477; Ord v. Noel, 5 Madd. 440; Flint v. Woodin, 9 Hare, 618; Wolfe v. Luyster, 1 Hall, 146; Steele v. Ellmaker, 11 Serg. & R. 86; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Benjamin on Sales, § 474, note r; Lee v. Lee, 19 Mo. 420; Latham v. Morrow, 6 B. Mon. 630. But in Green v. Baverstock, 32 L. J. Com. P. 181, 14 Com. B., N. S., 204, the employment of a single puffer was adjudged to be prima facie evidence of fraud.

Digitized by Google

and the sum at which the same ought to be sold, and at what stated sum each lot ought to be sold. The master then draws a conclusion from the evidence before him, and fixes a bidding, which he commits to writing, and incloses under a sealed cover, and delivers to the person appointed to sell the estate."[378] If a sale is announced to take place "without reserve," the vendor will not be permitted to employ a bidder, even to prevent a sacrifice.[379] In the second place, it has been held that the purchaser cannot be released on account of the employment of puffers, where it appears that his bid was not induced by competition with them. Thus, if no one bids but the purchaser and the puffer, it is clear that the former may be released from his bid.[380] But after all the puffers have ceased bidding, a competition may take place between bona fide bidders. If so, the successful bid is deemed to be the result of the real rather than of the fictitious competition, and cannot be avoided on account of the prior puffing.[381] A purchaser, on discovering that he has been injured by competing with puffers, must, if he wishes to complain of the wrong done to him, act promptly and offer to restore the property and rescind the contract on his part.[382]

[378] Daniell's Ch. Pr., 4th Am. ed., 1268, 1269.

[379] Robinson v. Wall, 2 Phila. 372; Thornett v. Haines, 15 Mees. & W. 367; Meadows v. Tanner, 5 Madd. 34; Bexwell v. Christie, 1 Cowp. 395. The cases in which vendors of real estate may employ a person to bid for them at auction sales in England are described by statutes 30 and 31 Victoria, chapter 48. See Gilliat v. Gilliat, L. R. 9 Eq. 60.

[380] Howard v. Castle, 6 Term Rep. 642.

[381] Bramley v. Alt, 3 Ves. Jr. 620; Woodward v. Miller, 2 Coll. 279; National Bank v. Sprague, 20 N. J. Eq. 159; Tomlinson v. Savage, 6 Ired. Eq. 430.

[382] McDowell v. Simms, 6 Ired. Eq. 278; Staines v. Shore, 16 Pa. St. 200, 55 Am. Dec. 492; Backenstoss v. Stahler, 33 Pa. St. 251, 75 Am. Dec. 592.

Digitized by Google

§ 299. Statute of Frauds—Memorandum of Sale.—The question whether a judicial sale is within the statute of frauds has not arisen for decision very frequently, and most of the observations on the subject are mere dicta. Doubtless, after the sale is confirmed it cannot be assailed because within the statute of frauds. Nor can any other contract be avoided, because within the statute of frauds, after it has been made the basis of a valid adjudication. The proper application of the principles of res judicata would prevent the reopening of a question closed by the judgment. Hence, after sales are reported to and confirmed by the court, it will not permit the purchasers or others to assail their validity for want of a note or memorandum in writing.[383] But the question, as we have suggested, can only arise before the confirmation. Either party may refuse to proceed, and may resist the confirmation, and deny that any sale has been made. If so, we think it must be held that the sale must be supported by a memorandum sufficient within the statute of frauds.[384] This memorandum, however, need not, we think, be signed by the purchaser nor by any of the parties to the suit; but may be made by the master or other officer charged with the duty of selling, and may consist of his report of his proceedings made and signed by him and filed in the cause.[385]

[383] Daniell's Ch. Pr., 4th Am. ed., 1283; Attorney-General v. Day, 1 Ves. Sr. 218; Blagden v. Bradbear, 12 Ves. 466; Halleck v. Guy, 9 Cal. 181, 70 Am. Dec. 643.

[384] Hutton v. Williams, 35 Ala. 503, 76 Am. Dec. 297; Bozza v. Rowe, 30 Ill. 198, 83 Am. Dec. 184. The following contain dicta to the contrary: Halleck v. Guy, 9 Cal. 181, 70 Am. Dec. 643; Fulton v. Moore, 25 Pa. St. 468; King v. Gunnison, 4 Pa. St. 171.

[385] Hegeman v. Johnson, 35 Barb. 200; Nat. Fire Ins. Co. v. Loomis, 11 Paige, 431; Stewart v. Garvin, 31 Mo. 36.

Digitized by Google

The mode of procedure in the English court of chancery was such as to avoid any question as to whether the sale was within the statute of frauds. "The master's clerk prepares a paper, on which the biddings for the different lots are to be marked. This generally consists of a copy of the particulars of sale, with spaces between each lot. The lots are successively put up at a price offered by any person present, such person signing his name to the sum he offers in the above paper. Every subsequent bidder must also sign his name to the sum he offers until no person will advance on the last bidder, who is then declared to be the purchaser, unless there has been a reserved bidding fixed by the master, in which case, if the last bidding does not reach the reserved bidding, the master's clerk or person selling is to declare that the lot has not been sold, but has been bought in by the persons interested in the estate." [886]

With respect to execution sales, the assertion that such sales are, and the other assertion that they are not, controlled by the same rule as judicial sales, have both been frequently made with the utmost confidence. Mr. Browne, in his work on the statute of frauds,[887] seems to feel sure that execution and auction sales must be governed by the same rules with reference both to the necessity and the sufficiency of the memorandum of the sale. As he has not favored us with the citation of the authorities on which his conclusion was based, we may not be fully competent to judge of its justness. Our own researches have led us to a conclusion somewhat different from that announced by Mr. Browne. Certainly, quite a number of the decisions

[886] Daniell's Ch. Pr., 4th Am. ed., 1271.
[887] § 264.

Digitized by Google

accord with the opinion which he has given.[388] The statutes of the various states have provided that the proceedings of officers shall be stated in their official returns; and in case of a sale, a certificate or bill of sale is usually required to be made for delivery to the purchaser. These written evidences of the sale are probably all that the law exacts. The sheriff at the time of the sale may not make such a memorandum as would be required to give validity to an auction sale of property of like character or value. This omission, we think, will not impair the validity of the sale, nor enable the purchaser to escape from his bid. If any memorandum is needed, it may be made afterward by the official act of the officer, either in indorsing his return on the writ, or by preparing and signing a certificate of sale or a deed.[389] It is doubtless true that these sales are within the statute of frauds; but, as we have shown, the majority of the authorities maintain that the memorandum of sale may be made by the sheriff, and may consist of his official return indorsed upon the writ. In the absence of some official memorandum or return, no valid sale has been effected.[390]

[388] Hunt v. Gregg, 8 Blackf. 105; Gossard v. Ferguson, 54 Ind. 519; Chapman v. Harwood, 8 Blackf. 82, 44 Am. Dec. 736; Ruckle v. Barbour, 48 Ind. 274; Tombs v. Basye, 65 Mo. App. 30; Hadden v. Johnson, 7 Ind. 394; Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350; Spencer v. Pearce, 10 Gill & J. 295; Barney v. Patterson, 6 Har. & J. 182. The case of Remington v. Linthicum, 14 Pet. 84, was a Maryland case, in which the decisions in that state were followed.

[389] Tate v. Greenlee, 4 Dev. 149; Nichol v. Ridley, 5 Yerg. 63; Ingram v. Dowdle, 8 Ired. 455; Armstrong v. Vroman, 11 Minn. 220, 88 Am. Dec. 81; Nat. Fire Ins. Co. v. Loomis, 11 Paige, 431; Hand v. Grant, 5 Smedes & M. 506, 43 Am. Dec. 528; Hyskill v. Givin, 7 Serg. & R. 369; Alexander v. Merry, 9 Mo. 514; Hartt v. Rector, 13 Mo. 497; Emley v. Drum, 36 Pa. St. 123; Linn B. T. W. Co. v. Terrill, 13 Bush, 463; Jones v. Kokomo B. A., 77 Ind. 340; Elston v. Castor, 101 Ind. 426; 51 Am. Rep. 754; Sanborn v. Chamberlin, 101 Mass. 469; Stearns v. Edson, 63 Vt. 259, 25 Am. St. Rep. 758.

[390] Linn B. T. Co. v. Terrill, 13 Bush, 463.

Digitized by Google

§ 300. General Observations Concerning the Conduct of the Sale.—In the preceding sections of this chapter many of the rules to be observed in conducting execution and judicial sales have already been suggested. It is not intended to here repeat those suggestions, but rather to make additional ones. If the sale is made under a decree which contains directions concerning the time, mode, or terms of sale, it constitutes the law of the case to which the officer must yield unquestioning obedience.[391] If it directs the property to be sold in one parcel, it must not be subdivided.[392] It has even been held that any substantial departure from the directions of the decree will render the sale void, unless it has been approved by the court.[393] These sales are usually made at auction, and must, therefore, be subject to the law of auction sales, with respect to the manner of making and receiving bids. The object of the officer should be to obtain a fair price for the property, and all his proceedings should be consistent with that object. He may doubtless impose rules and regulations having for their object the prevention of puffing and by-bidding, and the assuring of himself that the persons bidding are doing so in good faith, and will make good their bids if the property should happen to be knocked down to them.[394] A bid may be withdrawn at any time prior to its acceptance.[395] After the bid

[391] Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753; Wheatley v. Tutt, 4 Kan. 195; Gould v. Garrison, 48 Ill. 258.

[392] Babcock v. Perry, 8 Wis. 277.

[393] Welch v. Louis, 31 Ill. 446.

[394] National Bank v. Sprague, 20 N. J. Eq. 159; Turner v. Indianapolis R. R. Co., 8 Biss. 380. A master, doubting the good faith of a bidder, may demand an immediate compliance with the terms of the sale. Irby v. Irby, 11 Lea, 165.

[395] Barnes v. Zoercher, 127 Ind. 165; Nebraska L. & T. Co. v. Hamer, 40 Neb. 281; Blossom v. M. & C. R. R. Co., 3 Wall. 196. On the

Digitized by Google

is accepted, the bidder has no right to withdraw it.[396] Where, however, the bidding was made in the name of the plaintiff, by his agent, who, "in bidding, exceeded his authority, by mistake, bidding more than he was authorized to bid, and more, in the aggregate, than he intended to bid, it was held that he might, on discovering his mistake, withdraw the bid." "The danger that the property when offered again may not be fairly sold is not so great as to outweigh the consideration that the execution debtor ought not to be allowed to insist upon an unauthorized act of the agent, and for the purpose of gaining the benefit of a mistake." [397]

The bid may be made by letter or other writing; but if so, it must be publicly cried as are other bids. There must be no circumstance of fraud or collusion between the officer and the bidder, and the former must not have acted as the agent of the latter.[398] The bid must be an unconditional cash bid; for the bidder cannot impose or vary the terms of the sale.[399] If a bidder undertakes to impose any condition to his bid not warranted by law or the decree of sale, it is thereby given such a character that the officer has no power to accept it, and should, therefore, reject it and proceed to

other hand, the sale may be discontinued or adjourned, on the payment of the judgment, or for any other sufficient reason, at any time prior to the acceptance of the bid. Until the property has been actually struck off to the bidder, there has been nothing but a proposal on either side, from which either may recede at pleasure. U. S. v. Vestal, 4 Hughes, 467.

[396] Downard v. Crenshaw, 49 Iowa, 296; Dills v. Jasper, 33 Ill. 263; Gray v. Case, 51 Mo. 463; Nebraska L. & T. Co. v. Hamer, 40 Neb. 281.

[397] Fuson v. The Conn. Gen. L. Ins. Co., 58 Iowa, 609.

[398] Dickerman v. Burgess, 20 Ill. 266; Wenner v. Thornton, 98 Ill. 156.

[399] Swope v. Ardery, 5 Ind. 215; Irby v. Irby, 11 Lea, 165.

Digitized by Google

receive such bids as he is authorized to accept.[400] If, for any cause, the highest bidder does not comply with the terms of the sale, or it appears that his bid, after being apparently accepted, will not be carried into effect, or must be rejected, the property cannot be awarded to the second highest bidder, but a new sale must take place.[401] If an officer imposes terms and conditions of sale, and a bid is made and accepted on those terms and conditions, the bidder cannot, on the ground that their imposition was unauthorized, compel his bid to be acted upon as though made without condition. Neither party can enforce the bid without the consent of the other, and, on the other hand, neither can compel the other to proceed as if the officer had not made the conditions a part of the terms of sale.[402] The property sold must be clearly ascertained and designated,[403] and the interest sold must be all of which the defendant is seised.[404] If the property to be sold consists of goods and chattels, it is the duty of the officer to exercise his discretion in arranging and offering it, either in separate parcels or in such lots as, in his judgment, will realize the most satisfactory price. Nor is the obtaining of a sufficient price the sole consideration worthy of respect by the officer. If a tract is to be subdivided, he may, in selecting the parcel to be offered for sale, seriously and unnecessarily impair the value of the remainder, as where his so doing results either in the sale of the part selected at a sacrifice, or in leaving the unsold part greatly impaired

[400] Nebraska L. & T. Co. v. Hamer, 40 Neb. 281; Dazet v. Landry, 21 Nev. 291; Moore v. Owsley, 37 Tex. 603.

[401] Dazet v. Landry, 21 Nev. 291.

[402] Cable v. Byrne, 38 Minn. 534, 8 Am. St. Rep. 696.

[403] Wooters v. Arledge, 54 Tex. 395.

[404] Eberstein v. Oswalt, 47 Mich. 254.

Digitized by Google

in value. Relief will be afforded by vacating the sale, especially if there is anything to indicate that the officer was not disinterested in what he did. "Though it is the duty of the officer to sell in parcels, or a less parcel than the whole tract where a less quantity will subserve the purposes and satisfy the execution, yet the subdivision must be discreetly made with a view to the interests of all concerned." [405]

§ 301. The Payment of the Bid.—The sale of property under execution should be almost immediately followed by the payment of the bid. The officer is not authorized to sell on credit,[406] nor has he any authority to accept payment otherwise than in cash.[407] Under ordinary circumstances, the officer need not, and ought not, to receive any other than an unconditional cash bid.[408] Hence, though the sale is judicial and subject to confirmation by the court, the purchaser has no right to refuse to pay his bid until the sale is confirmed, and, if he does so, the officer is authorized to proceed to a resale.[409] But he ought to remember that the writ is taken out and levied for the benefit of the plaintiff; and that the wishes and interests of the latter, when he is indisputably entitled to the proceeds of the sale, should be respected, unless he insists upon something tending unnecessarily to prejudice or op-

[405] Parker v. Glenn, 72 Ga. 637; Hamilton v. Burch, 28 Ind. 233.

[406] Negley v. Stewart, 10 Serg. & R. 207; Isler v. Andrews, 66 N. C. 552; Robins v. Bellas, 2 Watts, 359. Yet it would hardly be expected that the bidders would attend with the necessary coin in their hands. Some indulgence may be given. Ruckle v. Barbour, 48 Ind. 274. Requiring instantaneous payment would generally prove oppressive. Aldrich v. Wilcox, 10 R. I. 405.

[407] Phillips v. Foster, 19 Ga. 298.

[408] Swope v. Ardery, 5 Ind. 213; Chapman v. Harwood, 8 Blackf. 82, 44 Am. Dec. 736; Isler v. Andrews, 66 N. C. 552.

[409] Dazet v. Landry, 21 Nev. 291.

Digitized by Google

press the defendant. Hence, the plaintiff should be allowed to accept payment in any manner satisfactory to himself, and if the officer making the sale accepts in payment thereof the check of the purchaser, the plaintiff, by receiving such check from such officer, ratifies the act of the latter, and can no longer insist that it was unauthorized, nor proceed against the officer to recover the amount of the bid.[410] If the plaintiff becomes the purchaser, the officer ought not to exact payment in coin from him when he is clearly entitled to the proceeds of the sale.[411] So the officer ought not to decline to receive a bid from a person of whose solvency and good faith the plaintiff is satisfied.[412]

A purchaser who has not complied, nor offered to comply, with his bid, has acquired no interest in nor right to the property sold, and can maintain no action nor proceeding in regard thereto.[413] If, however, the officer surrenders the property to the purchaser, or otherwise treats the sale as consummated, the former becomes responsible to the plaintiff for the amount of the bid.[414] In Indiana, a deed issued, without exacting payment of the bid, is void.[415] Cases may occur in which deeds so issued can properly be treated as void; but that they are necessarily or ordinarily so, we deny.

[410] Sutton v. Baldwin, 146 Ind. 361.

[411] Russell v. Gibbs, 5 Cow. 390; Nichols v. Ketcham, 19 Johns. 92; Robertson v. Van Cleave (Ind.), 26 N. E. 899.

[412] Lane v. White, 12 Wis. 381.

[413] People v. Hays, 5 Cal. 66; Hardesty v. Wilson, 2 Gill, 481, 41 Am. Dec. 439; Davis v. Pryor, 6 Smedes & M. 114; Williams v. Smith, 6 Cal. 91; Askew v. Eberts, 22 Cal. 263; Leach v. Koenig, 55 Mo. 451.

[414] McCluskey v. McNeely, 3 Gilm. 578; Roberts v. Westbrook, 1 Cold. 115; Shaw v. Smith, 9 Yerg. 97.

[415] Ruckle v. Barbour, 48 Ind. 274; Chapman v. Harwood, 8 Blackf. 82, 44 Am. Dec. 736; McCormick v. The W. A. Wood M. & R. M. Co., 72 Ind. 518.

Digitized by Google

If they are void, then it is difficult to see on what principle the officer can be held answerable to the judgment creditor for the purchase price. Yet it appears to be unquestioned law that if the sheriff treats the sale as consummated, delivers the property to the purchaser, taking his check, extending him credit, or merely failing to collect the amount of the bid through negligence or inattention, the plaintiff is entitled to consider the sale as final and irrevocable, and to compel the officer to pay the purchase price as though it had been received by him in money on the day of the sale.[416] "A sheriff must demand money for property sold; and if that is not paid, he must then and there avoid the sale, and resell the property, giving notice thereof, and then make a new sale at a subsequent time. But if he takes anything but money, gives credit to the purchaser, delivers the property to him, and closes the sale, then what he takes must be treated as money in his hands to be applied on the executions."[417] So, if he is sued for not collecting and paying the amount for which he sold property under execution, the duty of averring and proving an excuse for not collecting the money is by law cast upon him. "If the sale was made to parties who refused or were unable to pay the amount bid by them for the property, we think the duty devolves upon him to show it, as if sued for failing to return an execution. It is not incumbent on the plaintiff to anticipate the defenses and meet them, but if he has a lawful excuse for his failure, it devolves on him to plead it."[418]

[416] Disston v. Strauck, 42 N. J. L. 546; Denton v. Livingston, 9 Johns. 96, 6 Am. Dec. 264; Wilbanks v. Untriner, 98 Ga. 801.

[417] Robinson v. Brennan, 90 N. Y. 208.

[418] State v. Spencer, 79 Mo. 314.

Digitized by Google

§ 302. Liability of Officers for Wrongful Sales.—The general proposition that the abuse of an authority conferred by law deprives officers of the protection of their writs, and makes them trespassers ab initio, is frequently enforced, and is well supported by authority.[419] This rule has often been applied to officers making wrongful sales under execution; as, where exempt property is sold in defiance of a proper claim for exemption;[420] or the goods of A are sold under a writ against B;[421] or a sale is made before[422] or after[423] the time in which the officer was authorized to sell; or after sunset;[424] or at a place different from that designated in the notice of sale;[425] or in the absence of such notice.[426] But an action for selling without proper notice cannot be sustained until the purchaser has paid the amount of his bid. Until then, the defendant is

[419] Bradley v. Davis, 2 Shep. 44; Mussey v. Cummings, 34 Me. 74; Breck v. Blanchard, 20 N. H. 323, 51 Am. Dec. 222; Ladd v. Newell, 34 Minn. 107; Barrett v. White, 3 N. H. 210, 14 Am. Dec. 352, and note. If the sale of part of the property is authorized, and part unauthorized, the officer does not become a trespasser ab initio, with respect to the whole. So far as his proceeding was warranted by his writ, he is entitled to its protection; and he is answerable as a trespasser ab initio only to the extent of the excess. Wentworth v. Sawyer, 76 Me. 434; Seekins v. Goodale, 61 Me. 404, 14 Am. Rep. 568; Dod v. Monger, 6 Mod. 215.

[420] Wilson v. Ellis, 28 Pa. St. 238; Freeman v. Smith, 80 Pa. St. 264; Kerr v. Sharp, 14 Serg. & R. 399; Wilson v. McElroy, 32 Pa. St. 82; Van Dresor v. King, 34 Pa. St. 201; Spencer v. Long, 39 Cal. 700; ante, § 272.

[421] § 254.

[422] Knight v. Herrin, 48 Me. 533; Smith v. Gates, 21 Pick. 55.

[423] Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396.

[424] Carnrick v. Myers, 14 Barb. 9.

[425] Hall v. Ray, 40 Vt. 576, 94 Am. Dec. 440; Evarts v. Burgess, 48 Vt. 205.

[426] Carrier v. Esbaugh, 70 Pa. St. 239; Sawyer v. Wilson, 61 Me. 529; Sutton v. Beach, 2 Vt. 42.

Digitized by Google

not aggrieved by the sale.[427] There are many other cases in which an officer may become liable for his neglect or misconduct in making or conducting a sale, though probably most of them are not so serious in their character as to make him answerable as a trespasser ab initio. Thus, he is liable for an abuse of discretion in refusing to properly subdivide the property and compelling a sale en masse,[428] and is answerable in trover for property sold after he has realized money sufficient to satisfy his writ.[429] As the mode of conducting a sale, when improper, may result in injury either to the plaintiff or to the defendant, either may maintain an action against the officer for an injury thus inflicted. If it is the duty of the officer to first levy upon, or to first sell, personal property before resorting to real, and if he disregards this duty, the defendant is entitled to recover for such damages as he may prove that he sustained by the illegal action of the officer.[430] If he so conducts the sale that it is void, and, hence, does not produce any satisfaction of the judgment, the plaintiff may recover what injury thereby results to

[427] Askew v. Ebberts, 22 Cal. 263. The code of Iowa declares that "an officer selling without the notice prescribed shall forfeit one hundred dollars to the defendant, in addition to the actual damages sustained thereby." But where the property sells for its value, and the proceeds of the sale are applied on the execution against the defendant, the courts of that state have held that, as defendant sustained no damages, he could recover nothing—no damages because none were suffered, and no penalty, because it could be awarded only "in addition to the actual damages sustained." Coffey v. Wilson, 65 Iowa, 270; Enfield v. Blyler, 67 Iowa, 295.

[428] West v. Cooper, 19 Ind. 1; Tillman v. Jackson, 1 Minn. 133; Spaulding v. Perkins, 2 Mich. 157.

[429] Stead v. Gascoigne, 8 Taunt. 527; Batchelor v. Vyse, 4 Moore & S. 552; Aldred v. Constable, 6 Q. B. 370; 8 Jur. 956; Cook v. Palmer, 6 Barn. & C. 739; 9 Dowl. & R. 723.

[430] Gorham v. Hood, 27 Ga. 299; Beeler v. Bullitt, 3 A. K. Marsh. 280, 12 Am. Dec. 161; Simpson v. Hiatt, 13 Ired. 470.

Digitized by Google

him.[431] Where the irregularity does not necessarily injure the party complaining of it, this fact would appear to be a sufficient answer to any action brought by him therefor, as where defendant's property is subjected to a sale which is, because of some act or omission of the officer, void, and, hence, does not divest the defendant of his title. There are decisions, however, indicating that he may elect to treat the sale as valid, though unauthorized, and recover the value of the property sold. Thus, by the statutes of Kansas, property being offered for sale under execution must be appraised, and the officer has no authority to sell it except for at least two-thirds of the appraised value, and a sale made in defiance of this statutory prohibition is void. It has, nevertheless, been held in that state that "where a sheriff's sale is void for such a reason, and only for such a reason, and only to the injury of the judgment debtor, the judgment debtor may, if he chooses, waive the invalidity of the sale, treat the sale as valid, and make it valid by suing the sheriff for any damages which he may have sustained by reason of such irregular sale; and the sheriff in such a case will not be allowed to plead his own wrong or to set forth his own void sale to defeat the action." [432] He may also be held responsible for proceeding after an injunction has been served upon him,[433] or after he has notice of the allowance of a writ of error,[434] or has been notified of a writ of certiorari, and commanded to stay all further proceedings.[435] He may, however, lawfully proceed until he is officially notified of a supersedeas, or other

[431] Shropshire v. Pullen, 3 Bush, 512.
[432] De Jarnette v. Verner, 40 Kan. 224.
[433] Stinson v. McMurray, 6 Humph. 330.
[434] Belshaw v. Marshall, 1 Nev. & M. 689; 4 Barn. & Adol. 336.
[435] Spencer v. Long, 89 Cal. 700.

Digitized by Google

stay of proceedings.[436] If the officer misinforms the plaintiff or his attorney of the place of sale, by reason of which the plaintiff fails to attend the sale, and the property is sacrificed, the officer is answerable to the plaintiff for the damages suffered by him. Knowing why the plaintiff was absent, and seeing the property selling for inadequate prices, it was the officer's duty to have adjourned the sale, and thereby afforded the plaintiff an opportunity to protect his interests.[437] If property "of a bulky character, incapable of immediate manual delivery, is assumed to be sold by an officer, in pursuance of a levy thereon under due process of law, against the protest of the owner, as the property of another, to a purchaser who is left to take possession for himself," this is a conversion for which the owner may at once maintain an action against the officer.[438] In some of the states, the sheriff owes the duty to bidders to disclose to them the interest which he offers for sale, and to state any defects of title known to him. If he permits them to proceed upon the supposition that they will obtain a good title, when he has reason to believe they will not, he cannot remain silent without incurring the risk of being required to indemnify them for moneys paid to him under the delusive supposition.[439]

§ 303. Liability of Plaintiffs for Wrongful Sales.— In a preceding section,[440] we have considered the liabilities of plaintiffs and others for wrongful levies, and

[436] Payne v. Governor, 18 Ala. 320; Foster v. Wiley, 27 Mich. 244; Bryan v. Hubbs, 69 N. C. 423.

[437] State v. Moore, 72 Mo. 285.

[438] Hossfeldt v. Dill, 28 Minn. 469.

[439] Commonwealth v. Dickinson, 5 B. Mon. 506. 43 Am. Dec. 139; Bartholomew v. Warner, 32 Conn. 98, 85 Am. Dec. 251; Harrison v. Shanks, 13 Bush, 620.

[440] § 273.

Digitized by Google

have found that a plaintiff in execution is answerable for every act of the officer which he either directed or ratified, and is not answerable for any act of the officer which he neither directed nor ratified. Undoubtedly, the same principles must be applicable to wrongful sales. A plaintiff is, therefore, liable for proceeding upon a satisfied judgment,[441] or after a tender has been made of all the money which the officer is entitled to collect under the writ.[442] If anything occurs rendering it improper to proceed further under the writ, the plaintiff is answerable if he does not give prompt notice to the officer.[443] An officer who makes a sale has no implied authority to act for the plaintiff except in so far as the writ directs him. If he makes some representation not authorized by his writ, the plaintiff is not bound thereby. Therefore, if the officer making an execution sale asserts that the title to the property is good, and undertakes to make any warranty thereof, the plaintiff is not answerable for a breach of such warranty or representation, where, in making it, the officer acted without the plaintiff's authority.[444]

An officer making a sale wrongfully or without authority and who in consequence is subjected to an action therefor may, in turn, seek indemnity from the plaintiff. An officer, upon any question of doubt arising, has the right to ask the plaintiff for instructions and to demand indemnity in case the act insisted upon by the plaintiff may expose the officer to liability.

[441] Swan v. Wood, 8 Wend. 676; Brown v. Feeter, 7 Wend. 301; Glover v. Horton, 7 Blackf. 295.

[442] Tiffany v. St. John, 5 Lans. 153; Mason v. Sudam, 2 Johns. Ch. 172.

[443] Jacobs v. Robb, 10 U. C. Q. B. 276.

[444] Lewark v. Carter, 117 Ind. 206, 10 Am. St. Rep. 40.

Digitized by Google

When, however, the plaintiff neither indemnifies the officer nor directs the doing of the act or acts for which the officer is subsequently subjected to liability, the plaintiff cannot be held answerable, and, therefore, is not liable to the officer because the latter sold property exempt from execution and was compelled to respond in damages to the defendant in execution, though the proceeds of the sale have been paid to the plaintiff.[445]

§ 304. Liability of Officers for Refusing or Neglecting to Sell.—Officers are liable if, for an unreasonable time, they refuse or neglect to sell property in their hands which is subject to sale.[446] The only difficulty in such cases is in determining the measure of damages. If, by the neglect or refusal to sell, the property is lost to the plaintiff, and the defendant is insolvent, the officer is liable for the value of the property.[447] In Georgia, an officer neglecting to sell is answerable to the plaintiff for the value of the property, if it does not exceed the amount of the execution.[448] In England, a different rule prevails, and officers neglecting to sell are not obliged to respond to the plaintiff, except for the actual damage suffered by him from their neglect.[449] The objection to this rule is, that a plaintiff may, where the defendant is perfectly solvent, be per-

[445] Russell v. Walker, 150 Mass. 531, 15 Am. St. Rep. 239; Hyde v. Cooper, 26 Vt. 552; Evarts v. Hyde, 51 Vt. 183.

[446] Carlile v. Parkins, 3 Stark. 163; Dorrance v. Commonwealth, 13 Pa. St. 160; State v. Herrod, 6 Blackf. 440; Harris v. Kirkpatrick, 35 N. J. L. 392; Aireton v. Davis, 9 Bing. 740; 3 Moore & S. 138; Jacobs v. Humphreys, 4 Tyrw. 272; 2 Comp. & M. 413; Gilbert v. Watts-De Golyer Co., 169 Ill. 129, 61 Am. St. Rep. 154.

[447] Royse v. Reynolds, 10 Bush, 286.

[448] Neal v. Price, 11 Ga. 297.

[449] Clifton v. Hooper, 6 Q. B. 468; 8 Jur. 958; 14 L. J. Q. B. 1; Bales v. Wingfield, 2 Nev. & M. 831.

Digitized by Google

petually kept out of the fruits of his judgment, because, during the continuing solvency of the defendant, it is impossible to show that any beyond nominal damages resulted from the failure to sell. An officer may successfully defend an action for not selling goods levied upon by him, by showing that they did not belong to the defendant, and, therefore, cannot lawfully be sold under a writ against him.[450]

[450] Snoddy v. Foster, 1 Met. (Ky.) 160; Leavitt v. Smith, 7 Ala. 175; Mason v. Watts, 7 Ala. 703; Hopkins v. Chandler, 2 Harr. (N. J.) 299; Union Bank v. Benham, 23 Tex. 143; Harris v. Kirkpatrick, 35 N. J. L. 392.

Digitized by Google

CHAPTER XX.

REPORTING, CONFIRMING, AND VACATING CHANCERY SALES.

§ 304 a. The necessity for confirmation.
§ 304 b. The report of the sale and proceedings thereon.
§ 304 c. Notice of proceedings to confirm or vacate.
§ 304 d. Opening the biddings on account of an advance bid.
§ 304 e. Classification of grounds for refusing confirmation
§ 304 f. Denying confirmation for irregularities in the proceedings.
§ 304 g. Denying confirmation on account of misconduct.
§ 304 h. Denying confirmation on account of surprise.
§ 304 i. Denying confirmation because bidder has obtained an unconscionable advantage.
§ 304 j. Denying confirmation because unconscionable advantage has been obtained over the purchaser.
§ 304 k. Denying confirmation for defects in title.
§ 304 l. Decree of confirmation, and its effect.

§ 304 a. The Necessity for Confirmation.—If the sale is judicial, the court is the vendor, and, unlike other vendors, it is not bound by the acceptance of the bid by its agent who conducts the sale. The successful bidder, on his part, acquires no title by the sale alone, and no right, unless it be the right to have the court proceed with respect to him and his bid not wantonly or capriciously, but in a manner becoming to a court of chancery and in conformity to the rules of equity jurisprudence. "The accepted bidder at such a sale acquires by the mere acceptance of his bids no independent right, as in the case of a purchaser under execution, to have his purchase completed, but is nothing more than a preferred bidder or proposer for the purchase, depending upon the sound equitable discretion of the chancellor for the confirmation of a sale made

Digitized by Google

by a ministerial agent."[1] If, therefore, the officer who conducts a sale, in advance of its confirmation, executes a conveyance of the property, his act is absolutely void and cannot be accorded validity on proving that the proceedings were regular and such that, had they been reported to the court, it must have approved and confirmed them.[2] Another consequence of the rule that the highest bidder does not by his bid acquire an absolute right in the property is, that he cannot, prior to the confirmation of the sale, be regarded as an innocent purchaser, or, more accurately speaking, if, prior to such confirmation, he has notice of any equity to which the sale may be subject or of any adverse claim or interest in the property which may impair the value of his purchase, he may, on account thereof, ask to be relieved from his bid, and whether he does so or not, his rights cannot be deemed fixed before the order of confirmation, and he is, therefore, chargeable with all the equities and claims of which he has notice before that time, though after the making of his bid.[3] A decree which authorizes a commissioner to sell lands, receive the purchase money, and make title, without requiring a report and confirmation of the sale, is irregular and erroneous, and, in North Carolina, relief against such a decree, if entered upon default for want of an answer, may be had upon motion, "until the decree is fully executed."[4]

[1] Busey v. Hardin, 2 B. Mon. 411; Vanbussum v. Moloney, 2 Met. (Ky.) 552; Taylor v. Galpin, 3 Met. (Ky.) 544; Wells v. Rice, 34 Ark. 346; State N. Bank v. Neel, 53 Ark. 110, 22 Am. St. Rep. 185; Hart v. Burch, 130 Ill. 426; Virginia etc. Co. v. Cottrell, 85 Va. 857, 17 Am. St. Rep. 108.

[2] Lumpkins v. Johnson, 61 Ark. 80; Greer v. Anderson, 62 Ark. 213; Horton v. Jack, 115 Cal. 29; Burden v. Taylor, 124 Mo. 12; Greenough v. Small, 137 Pa. St. 132, 21 Am. St. Rep. 859.

[3] State v. Quintard, 80 Fed. Rep. 829.

[4] Dula v. Stone, 98 N. C. 459.

Digitized by Google

As title does not vest in the purchaser until after the confirmation of the sale, he has, prior to that time, no right to the possession of the property sold, and no legal cause of complaint against the defendants, who remain in possession, exercising the rights of ownership, including the right to cut and remove "all crops growing upon the premises, and which are in a condition to be cut and removed in the usual course of good farming."[5] The highest bidder cannot transfer to another rights which he did not himself possess, nor can his transferee claim immunity from any action of the court which would have been proper had no transfer been made. Hence, the power of the court to withhold confirmation is not impaired by any transfer made by such bidder.[6]

The confirmation is a necessity to all parties who have any interest dependent upon the sale—to the purchaser, because, without it, he has no title; and to the parties to the suit, because, in its absence, they have no means of compelling the purchaser to comply with the terms of the sale.[7] Hence, it is a sufficient answer to a motion against the bidder to compel him to pay in his money, that the sale has not been confirmed.[8] Of course, it is competent for the court directing and authorizing a sale to fix the terms thereof, even to the extent of requiring the purchaser to pay the amount of his bid at the time of the sale without awaiting its report to or confirmation by, the court, and where the

[5] Allen v. Elderkin, 62 Wis. 627. If the purchaser takes possession before confirmation, he is a trespasser, and liable for mesne profits. Lupton v. Almy, 4 Wis. 242.

[6] Harwood v. Cox, 26 Ill. App. 374.

[7] Daniell's Ch. Pr., 4th Am. ed., 1281; Vincent v. Going, 2 Dru. & War. 75, note.

[8] Anonymous, 2 Ves. Jr. 335.

Digitized by Google

decree is to this effect, the purchaser's liability is complete on the acceptance of his bid by the officer conducting the sale.[9] Except, however, when the order of sale or the law expressly requires payment of the bid at an earlier date, it is not, though the terms of the sale are declared to be for cash, demandable until confirmation, for, until that time, there has not been any sale.[10]

In Ohio, the doctrine that the purchaser acquires no estate or right by the acceptance of his bid is carried so far as to permit the defendant, after the sale, to pay off the judgment, and, having done so, to successfully resist the confirmation of the sale.[11] But instances may occur in which the ratification or acquiescence of the parties may either estop them from invoking the rule that a confirmation is essential, or give rise to the presumption that an order of confirmation was made of which the evidence has been lost.[12] So, the approval of the court has sometimes been inferred from its subsequent acts and proceedings, though no order of confirmation can be found in its records.[13] The failure of the clerk to enter the decree of confirmation on the minutes of the court is not fatal to the purchaser's title, if it appears by competent evidence that such decree was, in fact, rendered by the court.[14]

[9] Camden v. Mayhew, 129 U. S. 73.

[10] Campe v. Saucier, 68 Miss. 278, 24 Am. St. Rep. 275; Hudson v. Cole, 97 N. C. 260.

[11] Reed v. Radigan, 42 Ohio St. 292.

[12] Smith v. West, 64 Ala. 34; Penn v. Helsey, 19 Ill. 295, 68 Am. Dec. 597; Henderson v. Herrod, 23 Miss. 434; Redus v. Hayden, 43 Miss. 614; Tipton v. Powell, 2 Cold. 19; Moore v. Green, 19 How. 69.

[13] Grayson v. Weddle, 63 Mo. 523; Robertson v. Johnson, 57 Tex. 62.

[14] Koehler v. Ball, 2 Kan. 172, 83 Am. Dec. 451.

Digitized by Google

§ 304 b. The Report of the Sale.—By the English chancery practice, the purchaser, if he wished to obtain the benefit of his contract, "must first procure at his own expense a report from the master of his being the best bidder for the lot he has purchased. After the report has been filed and an office copy taken by the purchaser, he must, at his own expense, apply to the court, by motion, that the purchase may be confirmed. This motion requires no previous notice, and the order made upon it will be that the purchase be confirmed nisi; i. e., unless cause is shown against it within eight days after the service of the order. The purchaser must procure an office copy from the registrar, and he may serve it upon the solicitors for all the parties in the cause. If no cause is shown within the eight days, the purchaser must apply to the court to confirm the order absolutely, which will be ordered, of course, on the production of an affidavit of the service of the order nisi, and a certificate of no cause being shown." [15] If the purchaser fails to move for the confirmation of the sale, the plaintiff may take the initiative, and by pursuing the proceedings heretofore designated as necessary on the part of the purchaser, may obtain a final order of confirmation. When the plaintiff is the actor, the order nisi must be served on the purchaser as well as on the parties to the suit.[16] "The usual mode of selling property under a decree or order in chancery is a direction that it be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private by a person authorized to make it. Not that the approba-

[15] Daniell's Chancery Practice, 4th Am. ed., 1274.
[16] Ibid. 1281.

Digitized by Google

tion of the master in either case completes a title to the purchaser. It is only the master's approval of the sale, and is one step toward a purchaser getting a title. Before, however, a purchaser can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made either privately or at auction. The report then becomes the basis of a motion to the court by the purchaser that his purchase may be confirmed. Notice of the motion is given to the solicitors in the cause, and confirmation nisi is ordered by the court, to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale, in the manner that such confirmation has been ordered." [17]

§ 304 c. Notice of Proceedings to Confirm or Vacate the Sale.—It will be observed that the proceedings with respect to the confirmation of the master's report, as shown in the preceding section, were such as gave both the parties and the purchaser abundant opportunity to protect their interests. This is essential whether the object be to obtain a rejection or a confirmation of the sale. The purchaser is a quasi party to the suit. He has the right to have notice of every proceeding affecting him, in order that he may appear and properly represent his case, and may, in the event that any improper action is taken with respect to him, prosecute appropriate appellate proceedings to correct such

[17] Williamson v. Berry, 8 How. 546.

Digitized by Google

action.[18] We by no means agree with the intimation of the supreme court of Iowa that a purchaser has no right to be heard upon the question whether the sale shall be vacated or refused confirmation.[19] He has not, it is true, any right to demand that his bid be accepted by the court when the facts developed warrant its rejection, but he should have the right to be heard, and generally, to have the action of the court reviewed if it refuses to confirm the sale in a case where it appears that such confirmation should have been ordered.[20] In truth, all the parties to the suit, and the bidder, by his bid, becomes one of them, have the right to be heard upon the question whether the sale ought to be confirmed, if the confirmation or refusal to confirm may prejudicially affect them.[21] In many of the states their statutes provide for a notice to be given of the application for the confirmation of the sale, and where this is so, the giving of such notice is jurisdictional, and if it appears not to have been given, the order of confirmation is invalid.[22] If, however, in the absence of any special notice, the party complaining was present in court and was heard, the order must be valid as against him, and when proceedings are taken for the confirmation of a sale and are sufficient to give the court jurisdiction to confirm, its jurisdiction also includes the power to refuse con-

[18] Wilkie v. Ingham, 52 Mich. 641; Delaplaine v. Lawrence, 10 Paige Ch. 602; Kable v. Mitchell, 9 W. Va. 492; Blossom v. M. & C. R. R. Co., 1 Wall. 655.

[19] Trust Co. v. Street Ry. Co., 96 Ia. 646.

[20] Connell v. Wilhelm, 36 W. Va. 598.

[21] Cohen v. Menard, 136 Ill. 130; Collins v. Ritchie, 31 Kan. 371; Cowdin v. Cowdin, 31 Kan. 528; Beckwith v. Kings M. M. Co., 87 N. C. 155; Cravens v. Wilson, 48 Tex. 340; Flanagan v. Pearson, 50 Tex. 583; Thomas v. Farmers' N. B., 86 Va. 291.

[22] Armstrong v. Middlestadt, 22 Neb. 711.

Digitized by Google

firmation, or, in other words, to vacate the sale and direct a resale.[23]

§ 304 d. Opening the Biddings on Account of an Advance Bid.—A motion may be made to open the biddings, in which event the proceedings for confirmation are arrested until the motion is disposed of.[24] One of the results of the rule heretofore stated, that the purchaser obtained no right or title before confirmation, is, that the court is at liberty to decline to accept his bid for no other reason than that a better price can probably be obtained. In England, it was the custom to open the biddings on obtaining an advance offer of ten per cent on the previous bid.[25] The practice was not inflexible, and a few instances occurred in which an offer of a less advance was treated as sufficient,[26] when the original bid was so large that the advance offered, though less than ten per cent, amounted to five hundred pounds.[27] The biddings might be opened a second time, if the requisite advance was offered.[28] The motion to open the biddings might be made at any time before the final confirmation of the sale. If granted, it released the purchaser from his bid, and entitled him to the return of his deposit. If he had purchased two or more lots, the opening of the biddings, as to any one of them, gave him the option of having them opened as to all, if he made affidavit to the effect that his being declared the bidder of the lot as to which the biddings were opened had induced him to bid for the others.[29]

[23] Tompkins v. Tompkins, 39 S. C. 537.
[24] Vansittart v. Collier, 2 Sim. & St. 608.
[25] Anonymous, 3 Madd. 494; Bourn v. Bourn, 13 Sim. 189.
[26] Brooks v. Smith, 3 Ves. & B. 144.
[27] Garstone v. Edwards, 1 Sim. & St. 20.
[28] Scott v. Nesbit, 3 Bro. C. C. 475.
[29] Bates v. Bonnor, 6 Sim. 380; Price v. Price, 1 Sim. & St. 386; Moore v. Triplett, 96 Va. 603, 70 Am. St. Rep. 882.

Digitized by Google

The practice of opening the biddings merely because an advance bid is made prevails in some parts of the United States;[30] in others, the courts of chancery have not adopted the rules of the English courts upon this subject, and, therefore, will not reopen the biddings for an advance in price,[31] unless taken in connection with other circumstances showing that the sale ought not to

[30] Dula v. Seagle, 98 N. C. 458; Childress v. Hurt, 2 Swan, 490; Hay's Appeal, 51 Pa. St. 58; Owen v. Owen, 5 Humph. 352; Effinger v. Ralston, 21 Gratt. 437; Wilson v. Shields, 3 Baxt. 65; Click v. Burris, 6 Heisk. 539; Kingwood Bank v. Jarvis, 28 W. Va. 805; Dupuy v. Gorman, 9 Lea, 144; State v. Roanoke N. Co., 86 N. C. 408; State Bank v. Green, 11 Neb. 303; Todd v. Galego M. Co., 84 Va. 586; Ewald v. Crockett, 85 Va. 299; Moore v. Triplett, 96 Va. 603, 70 Am. St. Rep. 882. In no state is the practice of receiving advance or upset bids more firmly established than in Virginia. It is there well settled that the court may exercise a very liberal discretion on this subject; that, however, one who was present at the sale, and had there an opportunity of bidding, will rarely be permitted to put in an upset bid; and that, in receiving and acting upon such bids, the interests of the purchaser will be considered and respected so far as may be without impairing the equities of the parties to the suit; and that the highest bidder at the sale acquires such a right that his bid will be accepted, unless there is some substantial advance offered. Otherwise persons will be discouraged from attending and bidding at judicial sales. In the case last cited the court said: "Judicial sales are constantly taking place, and it must continue to be so as long as there are debts to be collected and liens to be enforced. Great care should be observed that the practice of the court in acting upon a report of sale should not be such as to deter bidders, but such as to induce possible purchasers to attend such sale, to encourage fair, open, and competitive bidding in order that the highest possible price be obtained, and to inspire confidence in the stability of judicial sales. This is due not merely to purchasers, but to creditors, debtors, and the owners of property which is to be sold by the court."

[31] Penn's Adm'r v. Tolleson, 20 Ark. 652; Adams v. Haskell, 10 Wis. 123; Andrews v. Scotton, 2 Bland, 629; Seaman v. Riggins, 1 Green Ch. 214, 34 Am. Dec. 200; Williamson v. Dale, 3 Johns. Ch. 290; Duncan v. Dodd, 2 Paige, 99; Colonial etc. M. Co. v. Sweet, 65 Ark. 152, 67 Am. St. Rep. 910; Forman v. Hunt, 3 Dana, 614; Re Leary, 50 N. J. Eq. 383; Kneeland v. Smith, 13 Wis. 591; Pewabic M. Co. v. Mason, 145 U. S. 349.

Digitized by Google

be confirmed. It is, perhaps, not correct to say that any of our courts have either absolutely adopted or absolutely rejected the English rule respecting the opening of the biddings on the offer of an increased bid. Whether they shall be opened is a question addressed to the sound discretion of the court making the sale, to be determined from all the circumstances, and such determination will rarely be reviewed upon appeal.[32]

The application to open the biddings may be made on behalf of any person who offers the requisite advance, and secures it in a manner satisfactory to the court. After an order has been entered confirming the sale, it is too late to reopen the biddings merely on account of an increased price being offered, however large.[33] In England, the statute 30 and 31 Victoria, chapter 48, section 7, has abolished the previously prevailing practice of opening the biddings on account of an advance bid. The parties may, as we have shown,[33a] protect the property from sacrifice by having a price fixed, below which it shall not be sold. By the statute referred to, the highest bidder is entitled, if his bid is accepted at the sale, to be declared and allowed to be the purchaser, unless the court or judge, on the ground of fraud or improper conduct in the management of the sale, opens the biddings or orders the property resold.

In Mississippi, on the other hand, the right to reopen the biddings has quite recently been asserted and regulated by statute. This statute declares that the chan-

[32] State Bank v. Green, 11 Neb. 303; Wakeman v. Price, 8 N. Y. 334; National Bank of Kingwood v. Jarus, 28 W. Va. 805; Moran v. Clark, 30 W. Va. 358, 8 Am. St. Rep. 66.

[33] Daniell's Ch. Pr., 4th Am. ed., 1288; Houston v. Aycock, 5 Sneed, 406, 73 Am. Dec. 131.

[33a] Ante, § 298.

Digitized by Google

cery court has power, in its discretion, to refuse confirmation of any sale for inadequacy of price, providing the party objecting to the sale enters into a bond with approved security for the payment of all costs thereby accruing, and conditioned that the property on a resale shall bring an advance of fifteen per cent upon the former sale, exclusive of costs. One who procures a resale under this statute is regarded as starting the bidding on the resale at the amount for which he has given security, and, unless there is a higher bid, becomes the purchaser at that sum.[34]

§ 304 e. Classification of Grounds for Refusing Confirmation.—Though there is no offer of an advanced bid of ten per cent or more, or though the court may, under its rules of decision, decline to open biddings on account of a mere advance bid, many other grounds may be urged with success against the confirmation of a sale. The confirmation may be opposed either by the original parties to the suit, or by the purchaser, who, by his bid, and the report of the commissioner or master, has become a quasi party to the suit. "Whether a court will confirm a sale made by a commissioner under its decree, must, in a great measure, depend upon the circumstances of each case. It is difficult to lay down any rule applicable to all cases; nor is it possible to specify all grounds which will justify the court in withholding its approval."[35] "The court in acting upon a report does not exercise an arbitrary, but a sound, discretion in view of all the circumstances. It is to be exercised in the interests of fairness, prudence, and with a just

[34] Mason v. Martin, 64 Miss. 572.
[35] Hartley v. Roffe, 12 W. Va. 424; Beaty v. Veon, 18 W. Va. 296.

Digitized by Google

regard to the rights of all concerned."[36] There must be some reason for refusing confirmation, for if the proceedings are regular, with no suggestion of unfairness or of unconscionable advantage gained by the purchaser or either of the parties, it is the duty of the court to confirm the sale.[37] Objections to the confirmation of chancery sales may, we think, be regarded as falling under some one of the following classes: 1. Those in which the objection is that the proceedings have been irregular in some substantial particular; 2. Those in which some fraud, trick, or device, or other misconduct has operated to the prejudice of the party objecting; 3. Those in which the complaining party has suffered through some surprise, misapprehension, or accident, which, though not due to the misconduct of his adversary, may yet entitle him to relief; and, 4. Those in which the contract of sale is so inequitable and unconscionable that the court will decline to enforce it. In cases of the latter class, the claim for relief is very frequently enforced by objections falling within one or all of the preceding classes.

§ 304f. Denying Confirmation for Irregularity in the Proceedings.—Errors or irregularities in the decree, or in the proceedings anterior thereto, which might have constituted proper and sufficient grounds for an appeal, or for any other revisory proceeding, are not available

[36] Brock v. Rice, 27 Gratt. 816; Thomas v. Farmers' N. B., 86 Va. 291; Moran v. Clark, 30 W. Va. 358, 8 Am. St. Rep. 66; Camden v. Mayhew, 129 U. S. 73.

[37] Adams v. Devalley, 40 Kan. 486; Condon v. Wood, 7 Kan. App. 577; Nebraska L. & T. Co. v. Hamer, 40 Neb. 281; Roberts v. Robinson, 49 Neb. 717, 59 Am. St. Rep. 567; Penn. M. I. Co. v. Creighton T. B. Co., 54 Neb. 228.

Digitized by Google

as objections to the confirmation of a sale,[38] provided such error or irregularity is not so grave as to impair the validity of the sale. Therefore, the wisdom of directing a sale under the circumstances in which it was directed cannot ordinarily be called in question by opposing its confirmation on the ground that, owing to a pending suit, no sale should have been ordered until such suit had terminated and the title of the property sold thereby been freed from doubt.[39] Where the mode of sale has been fixed by the decree, as where it directs the sale of several parcels en masse as an entirety, obedience to the decree in this respect cannot constitute a sufficient objection to the confirmation of the sale.[40] Still the discretion which the court has to refuse confirmation of a sale is not absolutely limited by the terms of its previous order. If it directs its receiver to make a sale of property in his hands and prescribes the mode to be pursued, and it appears that such mode was not suitable to the character of the property or the circumstances existing at the time of the sale, and that, owing thereto, an inadequate price was realized, the court may refuse confirmation with a

[38] Greenlaw v. Greenlaw, 16 Lea, 435; Hoover v. Hale, 56 Neb. 67; Dick v. Robinson, 19 W. Va. 159; Bullard v. Green, 10 Mich. 268; Todd v. Dowd, 1 Met. (Ky.) 281; Vanbussum v. Moloney, 2 Met. (Ky.) 550; Young v. Bloom, 22 How. Pr. 383; Koehler v. Ball, 2 Kan. 154, 83 Am. Dec. 451; Norris v. Callahan, 59 Miss. 140. "A party cannot have the benefit of a rehearing, or a bill of review, or an appeal, or writ of error, or an original bill, by simply filing exceptions to a report. The former proceedings must be considered as conclusive as to the matters of reference. Exceptions to the report must be confined to the report itself, the order being considered as conclusive, and to the evidence on which the report is based. If the master has obeyed the decree, and his report is sustained by the facts, exceptions are of little avail." Musgrove v. Lux, 2 Tenn. Ch. 579.

[39] Fidelity etc. Co. v. Roanoke I. Co., 84 Fed. Rep. 752.

[40] Nix v. Draughon, 56 Ark. 240; Central T. Co. v. Sheffield etc. R. Co., 60 Fed. Rep. 9.

Digitized by Google

view to directing a resale and prescribing conditions thereof more likely to realize a fair price for the property to be sold.[41]

The purchaser at a chancery sale, whether the rule of caveat emptor be held applicable to him or not, is always entitled to the title of all the parties to the suit—to the whole interest which the court has undertaken to sell. If there is any jurisdictional or other defect, the operation of which will be such that the purchaser will not, upon paying the bid and receiving a conveyance, become invested with the whole title with which the court assumed to deal, then he will be released from his bid.[42] There is always an implied warranty in judicial sales that the officer had authority to sell, and anything which establishes that he had no such authority entitles the purchaser to relief.[43] If a motion is made to vacate the judgment for a jurisdictional defect, it is improper to confirm the sale, unless such motion should be first heard and denied.[44]

There may be irregularities in the sale not sufficient to avoid it if confirmed, and of which the only parties who could be prejudiced thereby do not complain. May the purchaser urge these to obtain a release from his bid? There is a dictum to the effect that, because the purchaser could not obtain confirmation in such a case against the objection of a party to the suit, he will not be compelled to perfect his purchase; or, in other

[41] Deford v. Macwatty, 82 Md. 168.

[42] Cook v. Farman, 21 How. Pr. 286, 34 Barb. 95; Boykin v. Cook, 61 Ala. 472; Bartee v. Tompkins, 4 Sneed, 623; Goode v. Crow, 51 Mo. 214; Sanford v. White, 56 N. Y. 359; Earle v. Turton, 26 Md. 23; Fox v. Reynolds, 50 Md. 564; Freeman on Cotenancy and Partition, § 547; Freeman on Void Judicial Sales, § 48; Thrift v. Fritz, 7 Ill. App. 455.

[43] Stoney v. Sheetz, 1 Hill Ch. 465.

[44] Johnson v. Lindsay, 27 Kan. 514.

Digitized by Google

words, that the right of confirmation must be mutual.[45] But we think the more sensible rule is, that if the proceedings are such that the purchaser can acquire title, he will not be heard to urge irregularities which, manifestly, either had no effect whatever upon the sale, or operated to his advantage.[46] The following irregularities have been adjudged sufficient to justify a denial of confirmation of the sale: Want of proper notice of the sale;[47] selling distinct tracts en masse;[48] appointment by parol of the deputy who made the sale;[49] selling in defiance of a stay of proceedings.[50] A sale may be refused confirmation because not in the mode prescribed in the decree,[51] or even because the report fails to show whether it was so made or not.[52] A sale may, nevertheless, be confirmed, though, in making it, the officer departed from the directions of the decree, for the court may ratify his action, if it had power to have directed him, in the first instance, to proceed in the mode which he in fact pursued.[53]

Irregularities in the issuing of the execution or order

[45] Talley v. Starke's Adm'r, 6 Gratt. 348.

[46] Swan v. Newman, 3 Head, 289; Ex parte Kirkham, 3 Head, 517; Jennings v. Jenkins's Adm'r, 9 Ala. 285; Crogan v. Livingston, 17 N. Y. 218.

[47] Moncure v. Zunts, 11 Wall. 416; Conroy v. Carroll, 82 Md. 127; Nebraska L. & T. Co. v. Hamer, 40 Neb. 281; Ramsay v. Hersker, 153 Pa. St. 480; Morris v. Hastings, 70 Tex. 26, 8 Am. St. Rep. 570.

[48] Ficener v. Bott (Ky.), 29 S. W. 639; Hawes v. Detroit etc. I. Co., 109 Mich. 324, 63 Am. St. Rep. 581; Lay v. Gibbons, 14 Iowa, 377, 81 Am. Dec. 487; Bradley v. Luce, 99 Ill. 234; Boylan v. Kelly, 36 N. J. Eq. 331; but a sale was confirmed, though en masse, when the defendant, being present at the sale, made no objection to selling in that manner. Guaranty & S. D. Co. v. Jenkins, 40 N. J. Eq. 451.

[49] Meyer v. Patterson, 28 N. J. Eq. 239.

[50] Campbell v. Smith, 9 Wis. 305.

[51] Willett v. Johnson, 84 Ky. 411.

[52] Haney v. McClure, 88 Ky. 146.

[53] Farmers' L. & T. Co. v. Oregon P. R. Co., 28 Or. 44.

Digitized by Google

of sale may be urged as a ground for vacating a sale made thereunder, but, standing alone, we do not think that irregularities of this character ought to be sufficient to entitle the moving party to relief, unless they are of so grave a nature that the sale, if confirmed, may not divest the title of the judgment debtor.[54] The question, when the confirmation of an execution or judicial sale is resisted, is not to be settled solely by ascertaining whether there have been irregularities in the process or the proceedings of the officer, or the doing or the omitting of some act which ought not to have been done or omitted, but whether the proceedings, if confirmed, will pass the title to the property sold, and if so, will this result be equitable. Some irregularities may give rise to the inference that, because of them, the sale may be for a sum disproportionate to the value of the property, and others may be so purely technical in character as not to give rise to any presumption whatever. The court should, doubtless, in all cases disregard any mere irregularity from which no injury to the complaining party is shown, and which does not of itself create a presumption of such injury. It is idle to vacate one sale if it must be succeeded by another, unless the latter will result more favorably to the complaining party. Hence, he must generally show that, if confirmation be refused of the sale which he resists, a subsequent sale unattended with the irregularity which he points out will realize a better price.[55]

[54] Amato v. Ermann, 47 La. Ann. 967; Croom v. Winston, 18 Tex. Civ. App. 1.

[55] McGeorge v. Sease, 32 Kan. 387; Norman v. Olney, 64 Mich. 553; Hawes v. Detroit etc. Co., 109 Mich. 324, 63 Am. St. Rep. 581; Ecklund v. Willis, 44 Neb. 129; Whitlock v. Johnson, 87 Va. 323; Warren v. Foreman, 19 Wis. 35; Stockmeyer v. Tobin, 139 U. S. 176.

Digitized by Google

Therefore, unless prejudice is shown to have resulted from the irregular action, confirmation will not be denied because a sale was made en masse,[56] though one of the parcels was a homestead,[57] nor because the notice of sale was not published for the full time prescribed by law,[58] or the purchaser did not pay certain liens on the day of the sale,[59] or the summons was not served on an infant who, however, appeared by his guardian,[60] or the sale took place while a further accounting respecting liens remained to be heard,[61] or the adjournment of the sale on the date for which it was first advertised was not properly proclaimed,[62] or certain liens were not deducted from the appraisement of the premises sold.[63]

§ 304g. Refusing Confirmation on Account of Misconduct.—Under this head may be included all affirmative acts of the parties, the officer conducting the sale, the purchaser, and even of strangers to the proceeding, which result, or have probably resulted, in an unfair and inequitable sale. Among these, unquestionably, are unusually stringent terms imposed by the master requiring the immediate payment in coin of the amount of the bid, though persons were present of well-known solvency desirous of bidding, but not supplied with the requisite coin;[64] selling property en masse which it

[56] Hudepohl v. Liberty Hall etc. M. Co., 92 Cal. 588, 28 Am. St. Rep. 149.
[57] Lloyd v. Frank, 80 Wis. 306.
[58] Da Dilva v. Turner, 166 Mass. 407; McBride v. Gwynn, 83 Fed. Rep. 402.
[59] Miller v. Lanham, 35 Neb. 886.
[60] Carter v. Rountree, 109 N. C. 29.
[61] Utterback v. Mehlinger, 86 Va. 62.
[62] Marcus v. Collamore, 168 Mass. 56.
[63] Nebraska etc. I. Co. v. Cutting, 51 Neb. 647.
[64] Penn v. Tolleson, 20 Ark. 652.

Digitized by Google

was the duty of the officer to endeavor to sell in parcels;[65] disobedience by the master of the plaintiff's instructions not to sell unless a specified price could be obtained;[66] deterring bidding by falsely representing that the bid made was for the benefit of the defendant;[67] haste in conducting a sale, without any effort to procure bidders, the purchase being made by complainant's solicitor;[68] connivance between the auctioneer and a sham bidder, by which the biddings were run up far in excess of the value of the property;[69] selling in violation of an agreement to adjourn the sale,[70] or after misinforming defendant's attorney that the sale would take place at a later hour in the day.[71]

A true statement made or notice given by a party to the action or the officer conducting the sale, though it may be of a fact the knowledge of which may tend to depress the bidding, is not improper, and, therefore, does not require that the confirmation of the sale be denied.[72] On the other hand, every misrepresentation of fact or scheme entered into for the purpose of gaining an improper advantage may justify the court in refusing confirmation of the sale. The officer conducting it and the auctioneer employed by him have no right to bid at the sale, and if a sale is made to, or in the interest of, either, it may be vacated.[73] If a person obtains control of the decree to which his and other

[65] American Ins. Co. v. Oakley, 9 Paige, 259, 38 Am. Dec. 561.
[66] Requa v. Rea, 2 Paige, 339.
[67] Crutchfield v. Thurman, 4 Bush, 498.
[68] Busey v. Hardin, 2 B. Mon. 410.
[69] Brock v. Rice, 27 Gratt. 812.
[70] Mutual L. I. Co. v. Goddard, 38 N. J. Eq. 482.
[71] American W. Co. v. Scholer, 85 Mo. 496; Cameron v. Owens (Tex. Civ. App.), 25 S. W. 986.
[72] Fidelity etc. D. Co. v. Roanoke I. Co., 84 Fed. Rep. 752.
[73] Price v. Thompson, 84 Ky. 219; Smith v. Harrigan, 15 N. Y. Supp. 219.

Digitized by Google

lands are subject, under an agreement, that he will institute proceedings to have the court determine the order in which the several tracts shall be offered for sale, and, in the absence of such determination, proceeds to make such sale to himself as will relieve his tract and give him title to the remainder of the lands subject to the decree, the sale to him will be vacated.[74] We have already shown that combinations to prevent competition are unlawful. If one procures a sale to himself or in his interest as the result of such a combination, it will be vacated at the instance of an innocent person prejudicially affected by it.[75] But a party to the combination cannot be relieved, because of it, from any injury to which he may have exposed himself thereby through his coconspirators, or some of them, not complying with the agreement or otherwise.[76] Sometimes the misconduct complained of antedates the judgment or decree under which the sale was made, as where such judgment or decree is procured by a fraudulent contrivance, and without the service of process on the defendant, and for the purpose of acquiring title to his property. Under such circumstances the decree and sale may sometimes be set aside as the result of a motion made in the court wherein it was rendered.[77]

A transfer of the rights of the purchaser before the confirmation of the sale and without giving notice thereof to the court is regarded as misconduct on his part, especially where the transfer is for a valuable con-

[74] Aderholt v. Henry, 82 Ala. 541.

[75] Devine v. Harkness, 117 Ill. 145; Stuart v. Brown, 135 Ind. 232.

[76] Barling v. Peters, 134 Ill. 606; Kenny v. Lembeck (N. J. Ch.), 30 Atl. 525; Harrell v. Wilson, 108 N. C. 97; Barton v. Benson, 126 Pa. St. 431, 12 Am. St. Rep. 883; Camp v. Bruce, 96 Va. 521, 70 Am. St. Rep. 873.

[77] Stillwell v. Stillwell, 47 N. J. Eq. 275, 24 Am. St. Rep. 408.

Digitized by Google

sideration, and, hence, indicates that the sale was not for an adequate price. It further supports the inference that there may have been some combination between the transferee and the bidder whereby competition between them was prevented. For these reasons the fact of a transfer should be disclosed to the court before it proceeds to consider the question of confirmation, that it may make such inquiries as are naturally suggested to ascertain whether there has been any improper combination, and whether the sale, as reported, is for an adequate price. If the officer making the sale knows that the successful bidder has sold his rights to another, that fact should be disclosed to the court in the officer's report of the sale. When the court, by this means or otherwise, acquires knowledge of a transfer made or contemplated, it will not permit the scheme to be consummated, unless an affidavit is filed satisfying it that there is no underbargain by which the new purchaser is to give the other a sum of money, "as the rule appears to be, that if the purchaser resell behind the back of the court before the purchase is confirmed, the second party is considered as a substituted purchaser, and must pay the additional price into court for the benefit of the estate." [78]

§ 304 h. Denying Confirmation on the Ground of Surprise, Misapprehension, etc.—Where it would be manifestly unjust to permit a chancery sale to stand, confirmation of it will often be denied at the instance of a party in interest, who shows that it would not have been made but for his surprise, mistake, or excusable neglect. If the party objecting to the sale was misled

[78] Camp v. Bruce, 96 Va. 521, 70 Am. St. Rep. 873; Daniell's Ch. Pr. 1285.

Digitized by Google

with respect to the time or place of sale, either by positive misinformation, or by an agreement of the adverse party that notice would be given, which, in fact, was not given, and on that account failed to be present at the sale, and his absence resulted in the sacrifice of the property, confirmation of the sale must be refused.[79] The like result must follow where the party complaining was made to believe that the sale had been adjourned, or would not take place at all.[80] "Any mistake or misunderstanding between the persons conducting the sale and intending bidders or parties in interest, and any accident, fraud, or other circumstance, by which interests are prejudiced, without the fault of the injured party or parties, will be deemed sufficient cause for refusing confirmation and ordering a resale."[81] Any accident or unforeseen contingency preventing the party complaining from being present or represented at the sale will generally entitle him to relief; as, where he was detained in court as a juror;[82] or was under an honest misapprehension of the time of the sale;[83] or was prevented from reaching the place of sale in time, owing to the unusual inclemency of the weather;[84] or the agent whom he had employed to attend the sale forgot it;[85] or, from a conversation with

[79] Pell v. Vreeland, 35 N. J. Eq. 22; Rogers etc. H. Co. v. Cleveland B. Co., 132 Mo. 442; Commercial Bank v. Catto, 43 N. Y. Supp. 777.

[80] Hubbard v. Taylor, 49 Wis. 68; Strong v. Catton, 1 Wis. 471; Williamson v. Dale, 3 Johns. Ch. 290; Cole County v. Madden, 91 Mo. 585; Tripp v. Cook, 26 Wend. 143.

[81] Hilleary v. Thompson, 11 W. Va. 117.

[82] Hoppocks v. Conklin, 4 Sand. Ch. 582.

[83] Wetzlar v. Schaumann, 24 N. J. Eq. 60; Griffith v. Hadley, 10 Bosw. 587.

[84] Johnson v. Crawl, 55 Tex. 571; Roberts v. Roberts, 13 Gratt. 639; Pritchard v. Askew, 80 N. C. 86.

[85] Bixley v. Mead, 18 Wend. 611.

Digitized by Google

the master, received an impression that the sale would be postponed;[86] or was compelled to be absent in attendance on court as a witness;[87] or where he supposed the proceedings had been stayed pending an appeal, but a mistake had been made in the justification of the sureties, which prevented the appeal bond from operating as a supersedeas;[88] or where a gentleman, who attended for the purpose of bidding a much larger sum, was prevented from so doing "owing to his deafness and inability to hear the bidding himself, and the failure of his agent to pursue his instructions."[89] The fact that plaintiff did not authorize the bringing of a suit for partition entitles him to an order vacating a sale made therein.[90] Where the confirmation of a sale is resisted by a party on the ground of surprise, misapprehension, or mistake on his part, the real complaint must be that the sale is inequitable, and the mistake, misapprehension, or surprise be relied upon only for the purpose of exonerating the party from the charge of laches. The court may refuse relief on the ground that the mistake was not reasonable under the conceded circumstances,[91] or that the party having some knowledge of the intended sale did not take proper means to be represented thereat,[92] but the discretion of the court is usually exercised in favor of the

[86] Collier v. Whipple, 13 Wend. 224.

[87] Dewey v. Linscott, 20 Kan. 684.

[88] Gould v. Gager, 18 Abb. Pr. 32; 24 How. Pr. 440.

[89] Broomall v. Reybold, 5 Houst. 435. Some cases seem less lenient than those cited, and exact a higher degree of diligence from persons interested in sales. Babcock v. Canfield, 36 Kan. 437; Keene F. C. D. B. v. Marsh, 31 Kan. 771; Parkhurst v. Cory, 11 N. J. Eq. 233; Crompton v. Baldwin, 42 Ill. 165.

[90] Hurste v. Hotaling, 20 Neb. 178.

[91] Fiske v. Weigel (N. J.), 21 Atl. 452.

[92] Coffin v. Cook, 106 N. C. 376.

Digitized by Google

party if satisfied that injustice will be done by the confirmation of the sale, and that the mistake or misapprehension, whether of law or of fact, under which he labored really existed, and that his predicament is not the result of any want of good faith on his part.[93]

§ 304 i. Refusing to Confirm the Sale because the Bidder has Obtained an Unconscionable Advantage.— Where the property has sold at a grossly inadequate price, relief may, of course, be obtained in those states which have adopted the English rule of permitting the biddings to be opened at any time prior to confirmation; for in those states the confirmation of the sale is in the discretion of the court, and such discretion will not be exercised in behalf of an unconscionable contract.[94] And there are decisions in other states showing the vacation of sales where there seems to have been no substantial ground upon which to base the action of the court other than the gross inadequacy of the bid,[95] though in none of these cases did the court announce as a rule of decision that confirmation might be withheld for inadequacy of price. From this statement we except the decisions of the supreme court of Iowa. It maintains that, in the case of a judicial sale, when no right of redemption exists, the sale must be approved by the court, and that such approval may

[93] Great West M. Co. v. Woodmas etc. M. Co., 12 Colo. 46, 13 Am. St. Rep. 204; Bean v. Haffendorfer, 84 Ky. 685; Phillips v. Wilson, 164 Pa. St. 350; Stroup v. Raymond, 183 Pa. St. 279, 63 Am. St. Rep. 758.

[94] Kable v. Mitchell, 9 W. Va. 492; Hartley v. Roffe, 12 W. Va. 424; Hughes v. Hamilton, 19 W. Va. 366.

[95] Van Ness v. Hadsell, 54 Mich. 560; Pierce v. Kneeland, 7 Wis. 224; Chapman v. Boetcher, 27 Hun, 606; Duncan v. Dodd, 2 Paige, 99; King v. Morris, 2 Abb. Pr. 296.

Digitized by Google

properly be withheld solely on the ground of inadequacy of price.[96]

On the other hand, where resort is had to an independent suit for the purpose of setting aside a sale, it has been held that mere inadequacy of price, however gross, is not of itself a sufficient ground for relief.[97]

Very rarely, indeed, can a sale for a grossly inadequate price occur in which some excuse may not be made for the absence and inattention of the parties interested; and the courts will give credence to the excuse when offered, and, uniting it with the gross inadequacy, will find, in their united force, sufficient to deny the confirmation of the sale. Very few and perhaps no cases will arise in which it may be necessary to determine the abstract proposition of the effect of gross inadequacy of price, isolated from all other circumstances. Courts, too, may escape the proposition by seeing, or affecting to see, in the acceptance of a grossly inadequate bid, evidence of fraud or abuse of discretion on the part of the officer making the sale; for he may, and generally ought to, avoid this result by an adjournment of the sale to some more opportune occasion. So far as any general rule has been formulated upon the subject, it seems to be this: That mere inadequacy of price, where parties stand on an equal footing, and there are no confidential relations between them, it is not, of itself, sufficient to set aside a sale unless the inadequacy is so gross as to be proof of fraud, or to shock the judgment and the conscience."[98]

[96] Loyd v. Loyd, 61 Ia. 243.

[97] Sowle v. Champion, 16 Ind. 165; March v. Ludlum, 8 Sand. Ch. 35; McCotter v. Jay, 80 N. Y. 80; Eberhart v. Gilchrist, 11 N. J. Eq. 167.

[98] Marlatt v. Warwick, 18 N. J. Eq. 111; Howell v. Baker, 4 Johns. Ch. 118; Two Rivers M. Co. v. Beyer, 74 Wis. 210, 17 Am. St. Rep. 131.

Digitized by Google

So, in Maryland, it was said that "the court will not set aside a sale, in all other respects unexceptional, for inadequacy of price, unless the sum reported by the trustee is so grossly inadequate as to indicate a want of reasonable judgment and discretion in the trustee." [99] Chancellor Kent, when placed in a position where he must sustain a grossly inadequate sale, made on a stormy day, to the only person present other than the officer conducting the sale, or else set it aside upon a bill in equity brought for that purpose, escaped from the dilemma by declaring that "the most reasonable conclusion, and the only one honorable to the defendant, is, that the purchase was intentionally made, at the time, in trust for the respective interests of the parties to the execution"; [100] and thus an unconscionable self-seeker was involuntarily transformed into a disinterested guardian of the interests which he sought to destroy.

The case of Kloepping v. Stellmacher, 21 N. J. Eq. 328, is an extraordinary one, and is inconsistent with any other rule than that a sale may be set aside for gross inadequacy. The sale was free from all fraud and irregularity. It had been adjourned for the purpose of giving the defendants opportunity for protecting their interests; and they were personally notified of the sale. But they, being "ignorant, stupid, perverse, and poor," gave no attention to the matter, and their land, worth fifteen hundred dollars, was sold for fifty-two dollars. The sale was vacated on the ground that "though the information was given and understood," the court thought that the defendants could not

[99] Glenn v. Dorsey, 11 Gill & J. 9; House v. Walker, 4 Md. Ch. 62; Hughes v. Riggs, 84 Md. 502.

[100] Howell v. Baker, 4 Johns. Ch. 122.

Digitized by Google

have believed it, and that although the mistake was caused "by their own stupidity and perverseness, yet it should not be punished by a loss so great to them as this sale, if allowed to stand, would cause." It has, nevertheless, been finally settled in this state that inadequacy of price alone is not sufficient to warrant a court in refusing confirmation of a judicial sale.[101]

After citing most of the cases bearing upon this subject, the supreme court of the United States announced the following rule: "From the cases here cited we may draw the general conclusion, that if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, of if the owner of the property or party interested in it has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."[102] From the conclusion thus announced, that when there is great inadequacy of price, confirmation will be refused if any circumstances of irregularity or unfairness are shown to have preceded or attended the sale, there is no dissent.[103] To say, however, that such refusal may be justified, "if the

[101] Morrisse v. Inglis, 46 N. J. Eq. 306.

[102] Graffam v. Burgess, 117 U. S. 192. See, also, Schilling v. Lintner, 43 N. J. Eq. 444; Hunt v. Fisher, 29 Fed. Rep. 801. But in O'Callaghan v. O'Callaghan, 91 Ill. 228, a bill to set aside a sale of property worth four thousand dollars for ten dollars was dismissed.

[103] Parker v. Shannon, 137 Ill. 376; Rogers etc. Co. v. Cleveland etc. Co., 132 Mo. 442, 53 Am. St. Rep. 494; Warren v. Stinson, 6 N. D. 293.

Digitized by Google

inadequacy is so gross as to shock the conscience," is, in effect, to affirm that inadequacy may, in every instance, be a sufficient ground for refusing a confirmation, if it shocks the conscience of the judge to whose consideration it is presented. We think the decided weight of authority in the United States does not sustain this conclusion, and that, on the contrary, it asserts that, where there is no irregularity or unfairness, or, in other words, nothing but inadequacy, urged as a ground for refusing confirmation, it must fail, though the inadequacy be very clearly established and be so great that it may well be characterized as gross.[104]

In New York certain shares of bank stock were sold by a receiver acting under a decree in chancery. At the time of the sale the purchaser was aware, while the receiver was ignorant, of the fact that, in an action brought by certain stockholders, it had been adjudged that the directors were liable to the stockholders for the market value of the stock, and also for an assessment of one hundred per cent. The stock was sold for one hundred and seven dollars, while its par value was two thousand seven hundred dollars. The court declined to confirm the sale, saying: "The stock was put up for sale, and the appellant became the purchaser

[104] Parker v. Bluffton C. W. Co., 108 Ala. 140; Carden v. Lanek, 48 Ark. 216, 3 Am. St. Rep. 228; Smith v. Huntoon, 134 Ill. 24, 23 Am. St. Rep. 646; Brokaw v. Ogle, 170 Ill. 115; Hopper v. Davies, 70 Ill. App. 682; Hernden v. College of Bible (Ky.), 45 S. W. 67; Condon v. Maynard, 71 Md. 601; Johnson v. Avery, 60 Minn. 262, 51 Am. St. Rep. 529; Rogers etc. H. Co. v. Cleveland B. Co., 132 Mo. 442, 58 Am. St. Rep. 494; Bethlehem I. Co. v. Philadelphia etc. R. Co., 49 N. J. Ch. 356; Cuberre v. Pearson, 50 N. Y. Supp. 112; Stroup v. Raymond, 183 Pa. St. 279, 63 Am. St. Rep. 758; Weaver v. Nugent, 72 Tex. 272, 13 Am. St. Rep. 792; Jones v. Pratt, 77 Tex. 210; Carver v. Spence, 67 Vt. 563; Moran v. Clark, 30 W. Va. 358, 8 Am. St. Rep. 66; Fidelity etc. D. Co. v. Roanoke I. Co., 84 Fed. Rep. 752.

Digitized by Google

for one hundred and seven dollars, or thereabouts, and he now insists that the claim against the directors, under the judgment in the stockholders' action, passed to him, as incident to the sale, and that the court is bound to direct the receiver to carry out the sale by a transfer of the stock. Assuming, as the appellant contends, that a transfer of the shares would operate as a transfer of the claim, we are of opinion that the court properly refused to grant the motion. There was, doubtless, a complete executory contract in form for the transfer of the shares. But the contract, while executory, was subject to the supervisory power of the court. The court could, in the exercise of a just discretion, sanction or disapprove it, and the purchaser must be deemed to have purchased subject to this implied condition. The purchaser, by invoking the power of the court, submitted himself to its jurisdiction; and, in deciding the question presented, the court was not bound to grant the motion, if, in its judgment, the contract was inequitable, although there was no technical legal duty resting upon the purchaser to disclose his information in respect to the judgment, or although the receiver may have omitted to exercise the diligence which a prudent and careful officer ought to have done. The court, in dealing with the question presented, was acting in respect to the administration of a trust by one of its own officers. The receiver, in making the sale, acted under a misapprehension of the facts. The petitioner has acquired no fixed right to have the sale completed, and, under the circumstances, it seems more just that he should lose his bargain than that the trust estate should sustain the loss which may result from compelling the receiver to transfer the shares. We

Digitized by Google

think the court properly refused to enforce the contract of sale, and that the motion was properly denied."[105]

Though the court before which the question is presented is of the opinion either that inadequacy of price is of itself a sufficient ground for refusing confirmation of a sale, or that the sale was attended with circumstances of irregularity, and, hence, may properly be set aside if equitable considerations so require, still it will not act in a doubtful case, but will require clear and convincing evidence not merely that persons honestly believe that the price realized was inadequate, but, further, that if the sale is set aside and another sale directed, it will result in an increased bid.[106] Further, the inadequacy must not have resulted from the action of the party complaining of it, or his attorney,[107] and the party must have proceeded with reasonable diligence in seeking relief from the sale, and not have slumbered on his rights for years.[108]

Proceedings to vacate judicial sales or to have confirmation of them refused for inadequacy of price have lost much of their importance by the general enactment of statutes giving to persons whose property is sold at execution or judicial sales ample time to redeem therefrom. If the price resulting from such sales is inadequate, the ease of effecting a redemption is increased, and one who, having the right to redeem, fails to do so, must experience great difficulty in convincing the court that the sale of which he complains was for an inadequate price, or that a better price will be real-

[105] Attorney-General v. Continental Ins. Co., 94 N. Y. 203.

[106] Garritee v. Popplein, 73 Md. 322; Fidelity I. Co. v. Byrnes, 166 Pa. St. 496; Tucker v. Tucker, 86 Va. 679; Moran v. Clark, 30 W. Va. 358, 8 Am. St. Rep. 66; Connell v. Wilhelm, 36 W. Va. 598.

[107] Alexander v. Messervey, 35 S. C. 409.

[108] Meehan v. Blodgett, 86 Wis. 511.

Digitized by Google

ized if the sale already made is set aside and another ordered. Therefore, if a judgment debtor, or any other person entitled to redeem has knowledge of the sale while his right to redeem remains, his remedy is to exercise that right, and, failing to do so, the sale will very rarely be vacated or refused confirmation for alleged inadequacy of price.[109]

§ 304 j. Refusing Confirmation of Sale because Unconscionable Advantage has been Obtained Over the Purchaser.—The confirmation of a sale may be resisted, or a motion to vacate a sale be made, by the purchaser as well as by one of the parties to the suit, and on the same grounds. That a purchaser may resist the confirmation of a sale for irregularity in the proceedings operating to his detriment, or for any fraud or misconduct of the parties, there can, we apprehend, be no question. Where, however, he urges merely that to hold him to his bid would be unconscionable, there is more occasion for dissent, and therefore more conflict of decisions. The English rule upon the subject is thus stated by Mr. Daniell: "Where the contract is unreasonable, the court will relieve the purchaser as well as the seller. Thus, in Savile v. Sale, 1 P. Wms. 745, a purchaser, about the time of the South Sea Bubble, was discharged on submitting to forfeit his deposit on the ground of the exorbitance of the price. With respect to the last case, however, it is to be observed that there is no doubt now that the circumstance that the price given is much beyond the value of the estate will not be, of itself, a sufficient ground to release a pur-

[109] Griffith v. Milwaukee H. Co., 92 Ia. 634, 54 Am. St. Rep. 573; Power v. Larrabee, 3 N. D. 502, 44 Am. St. Rep. 577; Hollister v. Vanderlyn, 165 Pa. St. 248, 44 Am. St. Rep. 657; Stroup v. Raymond, 183 Pa. St. 279, 63 Am. St. Rep. 758; Collins v. Smith, 75 Wis. 392.

Digitized by Google

chaser from his contract, even upon the terms of forfeiting a deposit. Where, however, a purchaser has, by mistake, given an unreasonable price for an estate, the court will, in a proper case, wholly rescind the contract." [110]

If, in the advertisement of the sale, or in representations made respecting the property, there is anything which occasioned a mistake or misapprehension on the part of the purchaser, in any substantial particular, he may be released from his bid.[111] Where a sheriff intended to sell certain lands of the defendant, and had the same appraised, and the purchaser, relying upon such appraisement, bid in the lands, he was released on showing that the lands sold were worthless sand banks lying adjacent to the lands appraised and intended to be sold.[112] He is not entitled to be released from his bid, however, on the ground that he had a secret understanding with the attorney for the plaintiff that he was to have the property at a stipulated price, no matter what was the amount of his bid, where it appears that such bidding was not in excess of the value of the property.[113]

§ 304 k. Denying Confirmation for Defects in Title.— That the rule of caveat emptor prevails in judicial sales has been so often repeated as to create a widely diffused understanding that the purchaser must make good his bid, whether any return can be given him for it or not. The better opinion is, that the rule of caveat

110 Daniell's Ch. Pr., 4th Am. ed., 1284.

111 Lachlan v. Reynolds, 1 Kay, 52; McCulloch v. Gregory, 1 Kay & J. 286; Clayton v. Glover, 3 Jones Eq. 373; Veeder v. Fonda, 3 Paige, 94; Hammond v Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167; Hirtle v. Kaulbach, 22 N. S. 336.

112 Frasher v. Ingham, 4 Neb. 531.

113 Gross v. Jancsok, 10 N. Y. Supp. 541.

Digitized by Google

emptor will not be applied in chancery sales while the court retains control of the proceedings; and that the purchaser will be released, and any payments made by him, and remaining within control of the court will be returned, if the condition of the title is such that he would not be required to accept it were the contract between him and a private individual. The court is the vendor, and it will not enforce a contract in its own favor, of which it would refuse to decree the execution, if the vendor were a private person.[114] "A purchaser on a partition or foreclosure sale has a right to expect that he will acquire a good title, and the law presumes that he bids with that object in view. He should not be left, upon receiving a deed, to the uncertainty of a doubtful title, or the hazard of a contest with other parties which may seriously affect the value of the property if he desire to sell the same."[115] "A purchaser of lands at a judicial sale, unless he is put upon his guard by some prior notice, may insist on a good title, and will not be required to pay over the purchase money and take a deed, unless the serious defects shown by him are remedied."[116] "Until the final ratification, a sale made by order of a court of equity is an executory contract, open to objection, and will not be enforced if it is inequitable and against good conscience to do so."[117] It is well settled that a purchaser

[114] Deadrick v. Smith, 6 Humph. 138; Read v. Fite, 8 Humph. 328; Argall v. Raynor, 20 Hun, 267; Mott v. Mott, 68 N. Y. 246; Lee v. Lee, 27 Hun, 2; People v. Globe M. L. I. Co., 33 Hun, 394; Pearson v. Johnson, 2 Sneed, 581; Bolivar v. Zeigler, 9 S. C. 287; Dodd v. Neilson, 90 N. Y. 243; Crouter v. Crouter, 133 N. Y. 55.

[115] Jordan v. Poillon, 77 N. Y. 520; Monaghan v. Small, 6 S. C. 177; Edney v. Edney, 80 N. C. 81; Kostenbader v. Spotts, 80 Pa. St. 430; Monarque v. Monarque, 80 N. Y. 320.

[116] Fryer v. Rockefeller, 63 N. Y. 272.

[117] Hunting v. Walter, 33 Md. 62.

Digitized by Google

at a judicial sale is entitled to a marketable title, and this has been defined to be a title free from reasonable doubt. A purchaser will not be compelled to take title where a doubtful question of fact relating to an outstanding right is not concluded by the judgment under which the sale was made.[118] This rule will not operate in every case to bar the enforcement of a sale. "If the existence of the supposed fact which is claimed or supposed to constitute a defect or a cloud upon the title is a mere possibility, or the alleged outstanding right is but a very improbable or remote contingency, which, according to ordinary experience, has no probable basis, the court may, in the exercise of a sound discretion, compel the purchaser to complete his purchase. It has been well said that this discretionary power is to be carefully and guardedly exercised, and applied only in a case free from all reasonable doubt."[119] In a few of the states, confirmation of a sale will be decreed, and payment of his bid exacted of a purchaser, notwithstanding defects in the title.[120] A purchaser's claim to relief is dependent upon his bid being made in the belief that the sale was of a perfect title. If he knew of the defect, or from pursuing inquiries suggested by the pleadings or the notice of sale would have known of it, he is not entitled to be released.[121] This remains true, though false statements

[118] Heller v. Cohen, 154 N. Y. 299.

[119] Cambreling v. Purton, 125 N. Y. 610.

[120] United States v. Duncan, 12 Ill. 523; Bassett v. Lockwood, 60 Ill. 164; Cashion v. Faina, 47 Mo. 133; Owsley v. Smith's Heirs, 14 Mo. 154; McAdams v. Keith, 49 Ill. 388; Schwartz v. Dryden, 25 Mo. 574.

[121] Eccles v. Timmons, 95 N. C. 540; Fryer v. Rockefeller, 63 N. Y. 268; Young v. McClung, 9 Gratt. 336; Riggs v. Pursell, 66 N. Y. 193; Ledyard v. Phillips, 32 Mich. 13; Graham v. Bleakie, 2 Daly, 55; McKernan v. Neff, 43 Ind. 508.

Digitized by Google

were made at the sale, if he was not deceived by them. Neither they nor a defect in the title of which he was aware constitute any ground for releasing him from his bid.[122]

§ 3041. Decree of Confirmation and its Effect.—In determining a motion to confirm or vacate a sale, the action of the court is limited to the granting or refusing of the relief sought. It can make no change in the terms of the sale, nor impose conditions, nor provide that the confirmation shall become operative in certain contingencies only. It must simply approve or disapprove the sale.[123] In acting upon the report of a sale, the court doubtless acts judicially; and in most of the statesit does not proceed until notice has been given to all the parties interested in the sale. There therefore exists every reason for giving to decrees of confirmation the effect of final adjudications of all the questions in fact considered and decided, and also of all the questions which the parties ought to have presented for consideration and decision. But their effect as res judicata has not been recognized with such uniformity as we might reasonably expect. In Kansas, they are entered ex parte, and that fact abundantly justifies the court in restricting their effect, and in holding that they amount to no more than a decision that the proceedings, as shown in the return, are not such as require the disapproval of the sale.[124] Upon principle, we do not understand that they can be given a

[122] Re Leard's Estate, 164 Pa. St. 435.

[123] Green v. State Bank, 9 Neb. 165; Kinnear v. Lee, 28 Md. 488; Davis v. Stewart, 4 Tex. 223; Ohio L. I. Co. v. Goodin, 10 Ohio St. 557; Fitch v. Minsall, 15 Neb. 328.

[124] Benz v. Hines, 3 Kan. 380, 89 Am. Dec. 594; Rice v. Poynter, 15 Kan. 263.

Digitized by Google

conclusive effect upon any question whatever, because they lack the essential element of judicial authority, to wit, notice to the party whose rights are sought to be adjudged. In Minnesota, speaking of a guardian's sale under a statute requiring the court, if it should appear to the judge of probate that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property, to confirm the sale, the supreme court of the state said: "All the things necessary to appear to the judge of probate to authorize him to confirm a sale are thus specified in the statute. These things are, therefore, the basis of the order of confirmation, and it adjudicates on them alone. This adjudication is confined to the acts of the guardian in making and conducting the sale and to the sufficiency of the bid. The order of confirmation passes upon nothing else, and, hence, it is not proof of any other proceeding." [125] These decisions, however, when examined, go no farther than to affirm that an order of confirmation is not of itself evidence of the order of sale or of the taking of the steps essential to confer authority upon the court to direct the sale of the property. We must concede that the effect of the order is limited by the scope of the inquiry which the court was authorized to enter upon, for here, as elsewhere, a decision cannot extend either to affirming or denying matters which the court, in making it, had no power to determine.

The effect of the decree or order of confirmation must be considered, first, with reference to the proceedings taken in the court which entered it, for the purpose of modifying it or obtaining relief therefrom, and, second,

[125] Dawson v. Helms, 30 Minn. 107; Culver v. Hardenbergh, 37 Minn. 225.

Digitized by Google

with respect to proceedings elsewhere where the attack upon it must be deemed collateral.

Except where the chancery practice prevails, an order or decree of confirmation is ranked as a final judgment not subject to destruction or modification after the lapse of the term at which it was entered, otherwise than by resort to some appellate proceeding. Hence, a party entitled to the protection of an order of confirmation cannot be deprived thereof by an order of the court made at a subsequent term, purporting to vacate such order of confirmation.[126]

The court of chancery seems to have proceeded upon the principle that the parties and the purchaser, having been brought within its jurisdiction, they remained and were subject to such orders as it saw proper to make, though after a great lapse of time. The sale may have been confirmed, the money paid, and the property conveyed to the purchaser. Nevertheless, a petition may be filed suggesting some fraud, mistake, misapprehension, surprise, or other adequate ground for equitable relief; the purchaser brought before the court by some appropriate notice; and, if the facts asserted in the petition are established by evidence satisfactory to the court, the sale may be vacated.[127]

If we examine the grounds upon which relief in chancery will be granted after a decree or order of confirmation has been entered, we shall find that they are substantially the same as if an independent suit were

[126] State National Bank v. Neil, 53 Ark. 110, 22 Am. St. Rep. 185; Kincaid v. Tutt, 88 Ky. 392.

[127] Watson v. Birch, 2 Ves. Jr. 51; National Bank v. Sprague, 21 N. J. Eq. 457; Smith v. Allen, 22 N. J. Eq. 572; Mutual L. I. Co. v. Sturges, 33 N. J. Eq. 328; Cawley v. Leonard, 28 N. J. Eq. 467; Campbell v. Gardner, 11 N. J. Eq. 423; Tripp v. Cook, 26 Wend. 143; Collier v. Whipple, 13 Wend. 224.

Digitized by Google

brought for relief against the sale. The complainant must show some ground of rescission sufficient to entitle him to relief had he made the purchase of a private person. If the proceedings in the original suit are so irregular that certain infant parties thereto may, on coming of age, assail them with success, and thus defeat the purchaser's title, he will, on application, be relieved by vacating the order of confirmation.[128] "It is by no means, therefore, matter of discretion with the court to rescind a sale which it has once confirmed, nor is the sale to be rescinded for mere inadequacy of price, or for an increase of price alone; but some special ground must be laid, such as fraud, accident, mistake, or misconduct on the part of the purchaser, or other person connected with the sale, which has worked injustice to the party complaining. After confirmation, the purchaser at a judicial sale is as much entitled to the benefit of his purchase as a purchaser in pais, and the sale in the one case can be set aside only on such grounds as would be sufficient in the other. There is no principle upon which any distinction between the two classes of cases can be drawn, and if there be anything in the opinion of the court in Merchants' Bank v Campbell, 75 Va. 455, which can be construed as holding a contrary doctrine, the proposition has been overruled by subsequent decisions." [129]

Except when assailed upon appeal or relief is sought therefrom by motion in the court which entered it, an order of confirmation must necessarily have the same effect as res judicata as any other decision of a court

[128] Meddis v. Fenley, 98 Ky. 432.

[129] Virginia etc. I. Co. v. Cottrell, 85 Va. 857, 17 Am. St. Rep. 108; Allison v. Allison, 88 Va. 328; Harman v. Copenhaver, 89 Va. 836; Connaughton v. Bernard, 84 Md. 577.

Digitized by Google

having jurisdiction over the parties and the subject matter. This is especially true when the party seeking relief from the adjudication against him involved in the order had the right to be heard in opposition thereto, and by appeal to obtain a review of the action of the court.[130] "A decree of confirmation is a judgment of the court determining the rights of the parties, and such a decree possesses the same force and effect as any other adjudication of a court of competent jurisdiction."[131] Such errors and irregularities in the proceedings as might have been successfully urged against the confirmation of the sale, after its confirmation, no longer impair its validity, unless they are such as go to the jurisdiction of the court, and show, not that its action was erroneous but beyond its power.[132] The object of the proceedings for confirmation is to furnish an opportunity for inquiry respecting the acts of the officer in making the sale. The court may if it deems best ratify various irregularities in the proceedings; and whenever there is a power of ratification the principle prevails that a subsequent ratification is equivalent to a previous authorization. If the officer changes the terms of the sale, the court may ratify his action, provided the terms, as changed, are such as the court had power to sanction in the first instance.[133]

[130] Richardson v. Butler, 82 Cal. 174, 16 Am. St. Rep. 101; Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167; Speck v. Pullman P. C. Co., 121 Ill. 33; McLeod v. Applegate, 127 Ind. 349; Wilcox v. Raben, 24 Neb. 368, 8 Am. St. Rep. 207; Watson v. Tromble, 33 Neb. 450, 29 Am. St. Rep. 492; Deputronny v. Young, 143 U. S. 241.

[131] Allison v. Allison, 88 Va. 328.

[132] Burling v. Melhorn, 75 Va. 639; Langyher v. Patterson, 77 Va. 470; Worsham v. Hardaway, 5 Gratt. 60; Brown v. Gilmor, 8 Md. 322; Anderson v. Foulke, 2 Har. & G. 346; Deyton v. Bell, 81 Ga. 370; Clark I. Co. v. Hamilton, 54 Neb. 95.

[133] Jacobs' Appeal, 23 Pa. St. 477; Emery v. Vroman, 19 Wis. 689, 88 Am. Dec. 726; Thorn v. Ingram, 25 Ark. 58.

Digitized by Google

After a sale has been confirmed it cannot be defeated by showing collaterally that there was a failure to appraise the property,[134] or a defect in the notices of sale,[135] or that the commissioner who made the sale had no authority to make it,[136] or that the officer departed from the order of sale prescribed by the decree,[137] or that the commissioner who made the sale entered into a conspiracy to defraud one of the parties,[138] or that the sale was confirmed at an adjourned term of the court instead of at a regular term, and the administrator making it failed to take security for the purchase money.[139]

Even where the practice of opening the biddings on the reception of an advance bid prevails, the motion for such opening, unless based on other grounds than the advance offer, must be made before an order is entered confirming the sale.[140] So the purchaser must satisfy himself respecting the title before he permits an order of confirmation to be entered. Otherwise, he is precluded from objecting, whether for encumbrances or defects in the title, and cannot be released from the payment of his bid.[141] An order of confirmation cannot supply the want of authority to sell. Hence, if the decree directing the sale was void for want of jurisdic-

[134] Neligh v. Keene, 16 Neb. 407; Watson v. Tromble, 33 Neb. 450, 29 Am. St. Rep. 492.

[135] Wyant v. Tuthill, 17 Neb. 495; May v. Marks, 74 Ala. 249.

[136] Core v. Stricker, 24 W. Va. 689.

[137] McGavock v. Bell, 3 Cold. 512.

[138] McLeod v. Applegate, 127 Ind. 349.

[139] Wilkerson v. Allen, 67 Mo. 502.

[140] Blue v. Blue, 79 Va. 69; Coffin v. Corruth, 1 Cold. 194; Henderson v. Lowrey, 5 Yerg. 240.

[141] Thomas v. Davidson, 76 Va. 338; Long v. Weller, 29 Gratt. 347; Threlkelds v. Campbell, 2 Gratt. 198; Dresbach v. Stein, 41 Ohio St. 70; Mech. S. & B. Assn. v. O'Connor, 29 Ohio St. 651; Watson v. Tromble, 33 Neb. 450, 29 Am. St. Rep. 49.

Digitized by Google

tion, no force can be given it by a decree of confirmation.[142]

Upon the hearing of a return of sale the attention of the court is ordinarily restricted to the proceedings taking place subsequent to the entry of the order of sale. It is true that the confirmation may be resisted on the ground that no order of sale has been made, or, if made, that it is for some reason void. If such an issue should be tendered, and the court should consider and erroneously determine it by affirming that the order relied upon was valid and adequate, when, in fact, either invalid or inadequate, and the party before the court should not challenge its decision by an appeal, it is not possible to state with any confidence what the result would be, though, upon principle, it should be that such determination is conclusive upon the parties before the court. So far as the courts have examined this question, they have inclined to the view that, at the making of the sale, authority to make it must have existed, and that such authority cannot be supplied or inferred from a subsequent order of confirmation, and, hence, that a judicial sale cannot be sustained except by showing a preceding order of sale;[143] and, further, that if the order when produced is void for want of jurisdiction or otherwise, the sale must be pronounced invalid, notwithstanding the order of confirmation.[144]

Though there is a valid decree, the sale may include property not described in such decree. If so, it cannot be validated by a decree of confirmation. When this

[142] Townsend v. Tallant, 33 Cal. 54, 91 Am. Dec. 617; Gulf Coast C. Co. v. Foster (Miss.), 17 So. 683.

[143] Dawson v. Helms, 30 Minn. 107; Culver v. Hardenbergh, 37 Minn. 225.

[144] Bethel v. Bethel, 8 Bush, 65, 99 Am. Dec. 655; Wills v. Chandler, 2 Fed. Rep. 273; Lamaster v. Keeler, 123 U. S. 376.

Digitized by Google

question was presented to the supreme court of the United States, it was disposed of as follows: "Upon principle, the question is by no means free from difficulty. We are clear that a sale without a decree to sustain it would be a nullity, and we doubt if a court could make it valid by a mere general order of confirmation. If, however, an issue had been made by exceptions, or other proper pleading, as to the question whether any particular piece of property had been included in the decree or order of sale, and the court had decided that it was so included, it might be an adjudication upon the construction of the decree which would bind the parties. Nothing of the kind occurred here. There is every reason, on the contrary, to believe that the court had no suspicion that the marshal had sold more than the decree authorized. In the light of these facts, we cannot give to the order of confirmation, in this case, the effect of making valid the marshal's sale, however the rule might be on that subject in other cases. But we do not mean to intimate that in any case a sale by a marshal or master in chancery can be valid when there is no decree to support it. Cases in this court would seem to decide that it cannot." [145] The statute of Louisiana probably concedes to orders confirming judicial sales a greater effect than is given to them in any other state. Speaking of this statute the supreme court of the United States said: "It confers upon the order made by the court upon the monition 'the authority of res judicata,' so as to operate 'as a complete bar against all persons, whether of age or minors, whether present or absent, who may hereafter claim the property so sold, in consequence of all ille-

[145] Minnesota Co. v. St. Paul Co., 2 Wall. 640, citing Shriver v. Lynn, 2 How. 43, and Brignardillo v. Gray, 1 Wall. 627.

Digitized by Google

gality or informality in the proceedings, whether before or after judgment'; and the judgment of homologation is to be received and considered 'as full and conclusive proof that the sale was made according to law, in virtue of a judgment or order legally and regularly pronounced in the interest of the parties duly represented,' saving and excepting 'that it shall not render a sale valid made in virtue of a judgment, when the party cast was not duly cited to make defense. By the very terms of the statute, all objections that apply to the manner of conducting the sale and to the form of the judgment are cut off by the judgment of homologation. The only question that the judgment leaves open is, whether the court that rendered the original judgment had jurisdiction of the person.'" [146] Referring to the same statute in a later case, the same court said: "Irregularities in the suit of foreclosure, under which property is sold for breach of condition, may be conclusively validated by such a proceeding, if the court which rendered the decree had jurisdiction of the case, and the record shows that the party defendant was duly notified of the suit; but the better opinion is, that if the court had no jurisdiction in such a case, or if the process was not duly served, the proceeding under the statute authorizing the monition will not cure the defect." [147] But a judgment of confirmation entered under this statute does not preclude a subsequent inquiry to determine whether the sale was tainted with fraud. "The judgment of confirmation is conclusive on the world. But conclusive of what? Conclusive that there have been no fatal informalities, or irregularities, or defects; we think of nothing more. The act has rela-

[146] Jeter v. Hewett, 22 How. 352.
[147] Montgomery v. Samory, 99 U. S. 490.

Digitized by Google

tion to mistakes or omissions of the officers of the law. But there is nothing in it which authorizes an inquiry into or an adjudication upon questions of fraud; nothing which concludes the question whether the purchasers have obtained their title by fraud, or whether they are trustees mala fide for others." [148]

Whether confirmation of a sale when made gives it effect from the moment of the sale or only from the making of the order of confirmation, is a question upon which the courts are not agreed. On the one side, it is insisted that the sale must be deemed as approved and made effective from the time of the acceptance of the bid,[149] and, on the other hand, that the confirmation "has no retroactive effect so as to relate back to the date of the sale, and give the purchaser the intermediate rents." [150]

[148] Jackson v. Ludeling, 21 Wall. 638; City Bank v. Walden, 1 La. Ann. 46.

[149] Taylor v. Cooper, 10 Leigh, 317, 34 Am. Dec. 737; Cole v. Shaw, 33 W. Va. 299.

[150] Pearson v. Gillenwaters, 99 Tenn. 146, 63 Am. St. Rep. 844; Armstrong v. McClure, 4 Heisk. 80; post, § 334.

Digitized by Google

CHAPTER XXI.

OF VACATING AND CONFIRMING SALES, AND THE ISSUE AND TRANSFER OF CERTIFICATES OF PURCHASE.

§ 305. For and against whom a sale may be vacated.
§ 306. To whom notice of motion to vacate must be given.
§ 307 The time within which the motion may be made.
§ 307 a. The time within which suit may be brought to vacate.
§ 308. The grounds upon which a sale may be vacated.
§ 309. Vacating for inadequacy of price.
§ 310. Whether vacation should be sought by motion, or by bill in equity.
§ 310 a. The effect of the absolute vacating of an execution or judicial sale.
§ 311. Confirming sales under execution.
§ 312. Certificates of purchase.
§ 313. Assignment of certificates of purchase.

§ 305. For and Against Whom a Sale may be Vacated.—The plaintiff, the defendant, and the purchaser may each be aggrieved by a sale under execution. Each is therefore entitled to prosecute a motion or action to set it aside, unless from some cause he has ceased to be prejudiced or affected by it,[1] or by his own misconduct he has brought about the wrong of which he complains.[2] Thus, a purchaser may move to vacate a sale because the proceedings are not sufficient to give him a title, or for any other reason rendering it unconscionable to enforce his bid, or the defendant, because of any irregularity in the proceedings to his prejudice, or amounting to a denial of his rights,[3] or

[1] Clayton v. Glover, 3 Jones Eq. 317; Galbreath v. Drought, 29 Kan. 711.

[2] Baggott v. Sawyer, 25 S. C. 405.

[3] Wolf v. Holton (Mich.), 75 N. W. 762; Lemon v. Heindel, 56 N. J. Ch. 8.

Digitized by Google

the plaintiff, because some irregularity, misconduct, mistake, or misapprehension has resulted in a sale for an inadequate price, leaving his judgment wholly or partly unsatisfied, or the sale, being to himself, he discovers that the defendant had no title, or that the proceedings are not sufficient to divest such title as he has.[4] While a sale may ordinarily be vacated for a failure of title such action will not be taken when the purchaser had notice of the state of the title. Thus, if a creditor, believing that a transfer made by the judgment debtor is fraudulent, takes out execution for the purpose of selling the property transferred and of thereby contesting the validity of the transfer, one who appears at the sale and outbids the judgment creditor cannot subsequently procure the vacation of the sale on account of such prior transfer.[5]

Strangers to an action have usually no right to interfere with its management, nor to complain of its result. The rule is the same regarding sales made under an execution issued in the action, if the person not a party to the record who seeks to vacate the sale is a mere intermeddler.[6] It has been said that no one can move to vacate a sale who cannot be injured by permitting it to stand, and therefore that the grantee of a judgment debtor whose grant had been made and recorded and he placed in possession before the entry of the judgment under which the sale was made, cannot move for its vacation.[7] But persons not parties to the action may have rights dependent upon or growing out of the sale; and if so, they are not bound to remain

[4] Bressler v. Martin, 133 Ill. 278; Bent v. Maupin, 86 Ky. 271; Beckwith v. Mining Co., 87 N. C. 155.

[5] Backle v. Webb, 11 Neb. 423.

[6] Smith v. Fletcher (Ark.), 11 S. W. 824.

[7] Laughlin v. Bradford, 82 Ala. 431.

Digitized by Google

idle and uncomplaining, while their interests are irregularly and perhaps fraudulently sacrificed. They may have acquired liens on the same property, subordinate to the lien of the plaintiff's writ, or have taken a transfer to which such lien is paramount. In that event, they are the real parties in interest, and may institute proceedings to vacate a sale.[8]

If one is the highest bidder, and the officer fraudulently or wrongfully refuses to recognize his bid, and reports the property as sold on a different bid, he is entitled to have the sale vacated.[9] The purchaser, by his purchase, becomes a party in interest, and is entitled to make or to resist a motion to annul the sale. But no person will be permitted to move for the vacation of an execution sale, unless he can show that he is a party in interest, and that his interest will be injuriously affected by permitting the sale to stand.[10] If the defendant has become bankrupt, and has in proceedings in bankruptcy, made an assignment of all his effects, he can no longer sustain a motion to vacate a sale. He has become a stranger in interest, and is so situate that it ought to be a matter of indifference to him whether the sale is supported or overthrown.[11] So one claiming the property adversely to the defendant cannot object to the sale.[12] No one will be allowed

[8] Cravens v. Wilson, 48 Tex. 324; Harrison v. Andrews, 18 Kan. 535.

[9] United States v. Vestal, 12 Fed. Rep. 59; 4 Hughes, 467.

[10] Johnson's Monition, 3 La. Ann. 656; Gilmer v. Nicholson, 21 La. Ann. 589; Fortier v. Zimpel, 6 La. Ann. 53; Stockton v. Downey, 6 La. Ann. 581.

[11] Laird v. Laird, 4 Pa. L. J. 474.

[12] Glassell v. Wilson, 4 Wash. C. C. 59. It was held that a mere mortgagee cannot move to vacate a sale. Frink v. Morrison, 13 Abb. Pr. 80.

Digitized by Google

to set aside a sale unless he will relinquish its fruits which have come into his possession.[13]

A sale may be vacated for sufficient reasons notwithstanding the resistance of either of the parties or of the purchaser thereat or of any other person who may have become interested therein. With respect to the purchaser and also to a redemptioner or the successor in interest of either, he may have equities worthy of the highest consideration, as where the amount bid or paid by him or his predecessor in interest has been applied to the satisfaction of the judgment, and the absolute vacation of the sale may leave him without means of compelling his reimbursement of the expenditures thus made for the benefit of the judgment debtor. We apprehend that in all these cases he who seeks the vacation of an execution sale, whether he proceeds by motion or by suit, must offer to do equity as a condition of being granted the relief which he seeks. If the purchaser at an execution sale, or a redemptioner from him, has acted in good faith and is not chargeable with notice of the defect, fraud, or other matter upon account of which it is claimed the sale should be vacated, there is no doubt that if the proceeding to vacate be by a suit in equity, the complainant must offer to do equity on his part, and that, as a general rule, the purchaser or redemptioner will be allowed the benefit of his purchase or redemption, though the sale may have been for an inadequate price, unless he is chargeable with notice of the fraud or irregularity of which complaint is made.[14] If the proceeding is by motion in the court

[13] Tarleton v. Kennedy, 21 La. Ann. 500; Johnson v. Caldwell, 38 Tex. 217.

[14] Sowles v. Harvey, 20 Ind. 217, 83 Am. Dec. 316; White v. Leeds I. Co., 72 Minn. 352, 71 Am. St. Rep. 488; Outcalt v. Disbrough, 2

Digitized by Google

whence the execution issued, and it appears that the purchaser has acted in good faith and without any knowledge of the defect or misconduct on account of which the vacation is claimed, we are unable to state upon authority whether or not the court may proceed against him. Doubtless, in such a case, the safer practice is to require the party complaining to resort to a suit in chancery, where the issues presented can be more satisfactorily tried and determined, and where the equities of all the parties can be considered and respected.[15] Still, we are by no means certain that the court may not take jurisdiction upon motion and determine the questions thereby presented. If so, it should proceed upon the same principles which would control a court of equity if similar matters and issues were presented to it in an independent suit.

§ 306. To Whom Notice of Motion to Vacate Sale must be Given.—A party interested in a sale, and conceiving himself to be injured by some fraud, defect, or irregularity with which it is connected, may seek to have it vacated. This he may do either by a motion made in the case in which the execution issued, or by an independent proceeding in equity. Whether the former or the latter remedy is chosen, it is essential that all the parties in interest be brought before the court.[16] No judicial tribunal will knowingly attempt to prejudice the interests or determine the rights of persons over whom it has not acquired jurisdiction; and if it should so attempt, the persons thus proceeded

Green Ch. 214; Williams v. Johnson, 112 N. C. 424, 34 Am. St. Rep. 513; Lebreton v. Lemaire (Tex. Civ. App.), 43 S. W. 31.

[15] Warren v. Stinson, 6 N. Dak. 293.

[16] Baker v. Hall, 29 Kan. 617; State Bank v. Marsh, 5 Eng. 129. See ante, § 304 c.

Digitized by Google

against need not regard the proceeding as possessed of any validity. When a sale is sought to be vacated, the plaintiff, the defendant, and the purchaser are all parties in interest. Notice must be given to the plaintiff in execution, because the vacation of the sale will destroy his right to the money realized therefrom.[17] It must be given to the defendant in execution, because, by vacating the sale, the credit which had been entered on the writ is canceled, and he becomes again personally responsible for the amount which, through the sale, had been paid.[18] The purchaser is always a necessary party, and entitled to notice of a motion to set aside the sale, because, if the motion prevails, he is thereby deprived of the profits of his purchase.[19] If the purchaser is absent from the state, he is none the less a necessary party to the motion; and notice must be given in the manner prescribed by statute for serving notices of motions upon absentees in other cases.[20] Of course notice is required only upon the assumption that the party omitted may be prejudiced by the action of the court. Therefore, if a bill of complaint in a suit to redeem from or to vacate a sale is so framed that no relief is sought against the plaintiff under whose writ the sale was made, and the granting of the relief which the plaintiff seeks may be decreed without in any

[17] McKinney v. Jones, 7 Tex. 598, 58 Am. Dec. 83; Good v. Coombs, 28 Tex. 84; Cline v. Green, 1 Blackf. 58; Lyster v. Brewer, 13 Ia. 461.

[18] Sears v. Low, 2 Gilm. 281; Chambers v. Hays, 6 B. Mon. 115; Parks v. Person, 1 Smedes & M. Ch. 76; Weaver v. Nugent, 72 Tex. 272, 13 Am. St. Rep. 792.

[19] Toler v. Ayres, 1 Tex. 398; McKinney v. Jones, 7 Tex. 598, 58 Am. Dec. 83; Williams v. Cummins, 4 J. J. Marsh. 637; Jewett v. Marshall, 3 A. K. Marsh. 154; Osborn v. Cloud, 21 Iowa, 238; Wilkie v. Ingraham Co. etc., 52 Mich. 641; Memphis L. & T. Co. v. Clark (Ark.), 11 S. W. 765.

[20] Eckstein v. Calderwood, 34 Cal. 658.

Digitized by Google

manner prejudicing him, he need not be made a party defendant.[21]

The supreme court of South Dakota, misapprehending the unquestioned rule that a purchaser at a sale becomes a party to the suit for certain purposes, has determined that neither the purchaser nor his assignee need be given any notice of a motion to vacate the sale, and that its vacation, without such notice, is binding upon him.[22] We have already shown that this is not the rule with respect to the bidder, and we believe that it is not as to his transferee or mortgagee, and that the court should not proceed without notice to the latter.[23] "To set aside a sale on motion, without notice, or showing that the opposite party voluntarily appeared, in no manner binds him, and the party making the same can derive no advantage therefrom."[24] If there are two defendants, and one of them makes a motion to vacate a sale, the other should be given notice.[25] In ordinary circumstances, the officer who made the sale has no direct interest in its maintenance. Where this is the case, and the officer's conduct is not drawn in question, he is not a necessary party to the motion to vacate the sale.[26]

§ 307. The Time within Which a Motion to Vacate a sale must be made has, we think, not yet been definitely ascertained. If the sale is a judicial one, requiring the confirmation of the court, the motion to vacate it ought to be made in answer to the application for the

[21] Stone v. Day, 60 Tex. 13, 5 Am. St. Rep. 17.
[22] State v. Campbell, 5 S. D. 626.
[23] Cuberre v. Pearson, 50 N. Y. Supp. 112.
[24] Wright v. Leclaire, 3 Iowa, 241; Lyster v. Brewer, 13 Iowa, 461.
[25] Stark v. Mitchel, 2 A. K. Marsh. 16.
[26] Beach v. Dennis, 47 Ala. 262; McKee v. Logan, 82 Mo. 524.

Digitized by Google

confirmation of the sale. If the grounds of the motion are irregularities in the proceedings, apparent from an inspection of the papers in the cause, or the report of the sale, or known to the injured or complaining party by any other means, we apprehend that he cannot successfully maintain any motion to vacate the sale after an order for its confirmation has been entered.[27] Most of the irregularities on account of which sales are set aside may be waived by the parties interested;[28] and this waiver may be presumed from their apparent acquiescence, as well as proved by direct and positive evidence. Mere presence at the sale, without interposing any objections, nor giving the bidders any warning, has sometimes been held to estop the defendant from vacating the sale for antecedent irregularities.[29] So, when defendant, having knowledge of a sale, permits it to stand unquestioned for a long period, his inaction affords a very strong presumption that he acquiesced in the sale. This acquiescence cannot be withdrawn after several years, and when the property has probably passed into the possession of strangers to the original sale. The reports, both at law and in equity, abound in statements that a party seeking to vacate an execution or judicial sale must act promptly;[30] that he must move in a reasonable time, and before innocent parties have acquired rights;[31] and that a tardy

[27] Ante, § 304 l.

[28] Crawford v. Ginn, 35 Iowa, 543.

[29] Studdard v. Lemmond, 48 Ga. 100; Power v. Larrabee, 8 N. D. 502. 44 Am. St. Rep. 577.

[30] Vanduyne v. Vanduyne, 16 N. J. Eq. 93; Hancock v. Metz, 15 Tex. 205; Francis v. Church, 1 Clarke Ch. 475.

[31] Daniel v. Modawell, 22 Ala. 365; Rigney v. Small, 60 Ill. 416; Cunningham v. Felker, 26 Iowa, 117; McKinneys v. Scott, 1 Bibb, 155; Bristow v. Payton, 2 T. B. Mon. 91, 15 Am. Dec. 134; Lyon v. Brunson, 48 Mich. 194; C. P. R. R. v. Creed, 70 Cal. 497; Spafford v.

Digitized by Google

application can never receive a favorable consideration, unless the delay is accounted for to the satisfaction of the court.[32] When we come to examine the facts involved in the cases in which these general principles have been announced, we find that the delays which the judges condemned were so extreme, and so without justification in their attendant circumstances, that we wonder that any one ever sought to excuse them, and are left in doubt concerning the rule to be applied where the applicant is guilty of laches less aggravated and persistent in their character. In Kentucky a motion on the part of the plaintiff purchasing at an execution sale to vacate it because the defendant had no title to the property, is not subject to the statute of limitations, and may, therefore, be prosecuted within any time which the court may deem reasonable under the circumstances disclosed.[33] In Alabama, it was at one time said that the motion to vacate may be made at any time before the purchaser obtains possession of the property, because, until he obtains or seeks to obtain such possession, the occupant may not know of the sale, or if he knows of it, may suppose that it has been abandoned.[34] This extreme rule was subsequently abandoned, and the court declared that while "there cannot be a time definitely settled within which parties must resort to judicial proceedings for the purpose of vacating a sale," still "there must not have been

Beach, 2 Doug. (Mich.) 150. The conveyance of a portion of the property by the purchaser, pending the hearing of a motion to vacate a sale, will not prevent the court from acting. Quaw v. Lameraux, 36 Wis. 626.

[32] Noyes v. True, 23 Ill. 503; Prather v. Hill, 36 Ill. 402; Goodwin v. Burns, 21 Mich. 211; Ingram v. Belk, 2 Strob. 207.

[33] Bent v. Maupin, 86 Ky. 271.

[34] Abercrombie v. Conner, 10 Ala. 293. See Chambers v. Stone, 9 Ala. 260.

Digitized by Google

laches, operating injuriously to others; there must not have been unexplained acquiescence for a considerable period, with full knowledge of the facts, as would form cogent evidence of waiver and abandonment of the right, if it be not the equivalent of a positive act of confirmation or release." [35] In Iowa, the motion must be made before the time for redemption expires and the deed to the purchaser is given.[36] This also seems to be the time adopted in Alabama where there is nothing on the one side to indicate any change in the circumstances of the purchaser inclining the court to insist upon a shorter time, and nothing on the part of the applicant showing any excuse for not moving within the time allowed for redemption.[37] This we deem the correct rule in all cases where the statute specifies a period within which redemption may be made.[38] Where, however, a purchaser is at once entitled to a conveyance from the officer making the sale, the right of a party to move for its vacation cannot be cut off by the immediate execution of the deed before reporting the sale, and, hence, before there is any opportunity to resist its confirmation.[39]

§ 307 a. Time within Which Suit may be Brought to Vacate Sale.—Before the statute of limitations interposes any positive bar to the maintenance of a suit

[35] Cowan v. Sapp, 74 Ala. 44; Ponder v. Cheeves, 90 Ala. 117.

[36] Stewart v. Marshall, 4 G. Greene, 75.

[37] Bolling v. Gant, 93 Ala. 89; Anniston P. Works v. Williams, 106 Ala. 324, 54 Am. St. Rep. 51.

[38] Power v. Larrabee, 3 N. D. 502, 44 Am. St. Rep. 577; Media T. Co. v. Kelly, 185 Pa. St. 131, 64 Am. St. Rep. 618; Raymond v. Pauli, 21 Wis. 531. After the deed has issued, the remedy, if any remains, is in equity only. Jenkins v. Merriweather, 109 Ill. 647; State Bank v. Noland, 13 Ark. 299.

[39] Hart v. Hines, 10 App. D. C. 366.

Digitized by Google

to vacate a sale, the court may decline to proceed because of laches of the complainant. These laches may be fatal to the suit, either because the long delay indicates that the complainant acquiesced in or tacitly ratified the sale, or because it has resulted in the purchaser conveying or improving the property, or so altering his condition in other respects that the vacation of the sale is manifestly inequitable.[40] "The law disfavors unnecessary and unreasonable delay in proceeding to avoid judicial sales. In order to promote the public peace and interest, and in view of the necessity of assured repose in the security of the title derived from such sales, consequent on maintaining their validity, unless fraud, or illegality, or irregularities seriously affecting their character and fairness intervene, the tendency of our decisions is to abridge the time in which a party seeking the disturbance of judicial sales is required to act, and to require clearer and more satisfactory explanations of apparent unnecessary delay. Ordinarily, proceedings should be instituted before the purchaser obtains possession, or improvements are made, or third parties have acquired rights, or any change in the situation of the parties, rendering it impracticable or difficult to put the purchaser in statu quo. The delay must not have operated injuriously to the purchaser or others, and there must not be an unexplained acquiescence in the validity of the sale for an unreasonable period, with full knowledge of the facts. Where the purchaser is the plaintiff in execution, and there has been no alteration in the condition of the property or of the parties, and

[40] Carden v. Lane, 43 Ark. 216, 3 Am. St. Rep. 228; Griffith v. Milwaukee H. Co., 92 Ia. 634, 54 Am. St. Rep. 573.

Digitized by Google

where there has been passiveness on the part of both, the defendant in execution being suffered to remain in undisturbed possession, the rule may be regarded as less exacting. But the party seeking the vacation of the execution sale, and the cancellation of the title of the purchaser, cannot postpone proceeding for an unreasonable period unexplained, without being subject to the charge of laches. In all cases, reasonable promptness, diligence, and good faith will be exacted, to be determined on the particular circumstances of each case—'whether they are such as to have induced inaction, or ought to have quickened vigilance and action'; whether from the circumstances a waiver of the right and acquiescence in the title by the party complaining, or of an intention of the purchaser not to claim under the title, may be inferred." [41]

When the statute permits the defendant to redeem the property within a time specified, and suspends the purchaser's right to a conveyance, or to the possession during that time, one who does not proceed within that time to vacate the sale must always give some sufficient excuse for his delay.[42] In extreme cases, however, some of the courts have been so eager to accept the excuse offered that they have seriously impaired the efficiency of the rule.[43]

§ 308. The Grounds upon Which a Motion to Vacate a Sale may properly be granted are so various as to

[41] Cowan v. Sapp, 81 Ala. 526, and 74 Ala. 44; Sayre v. Elyton Land Co., 73 Ala. 85; Walker v. Ruffner, 32 W. Va. 297; Melms v. Pabst B. Co., 93 Wis. 153, 57 Am. St. Rep. 899.

[42] Abbott v. Peck, 35 Minn. 499; Fletcher v. McGill, 110 Ind. 406. But in Lynch v. Reese, 97 Ind. 360, it was said that when the ground for vacating the sale was fraud, the suit might be begun at any time prior to its bar by the statute of limitations.

[43] Sioux City etc. L. Co. v. Walker, 78 Ia. 476.

Digitized by Google

defy complete enumeration. Most of these grounds have already been incidentally mentioned in other parts of this work, and have been particularly considered in the preceding chapter, in showing the various causes for denying confirmation of chancery sales. There is scarcely any fraud or irregularity, either in the issuing, form, or execution of a writ, which may not be made the occasion for a motion to vacate a sale. It is true that mere irregularities would, under ordinary circumstances, not be allowed to have so serious a result as to destroy a sale, or the writ under which it was made. But every motion for quashing a sale is to be determined with reference to all the attendant circumstances under which the writ was executed. If the proceedings all appear to be fair, if no undue advantages have been taken, if the prices realized are not disproportionate to the value of the property sold, then the sale cannot be avoided, except for irregularities of the gravest character. If, on the other hand, the proceedings have been marked by harshness and oppression, or connected with circumstances indicating an attempt to obtain an unconscionable advantage, or if the property has manifestly been sacrificed, or if any other serious wrong has resulted to any one from the sale, the courts will gladly seize upon any irregularity, and perhaps magnify its importance, in order to find a legal justification for such measures as will clearly subserve the ends of justice.[44]

A motion to vacate a sale may be based upon supposed defects either in the judgment or in the writ, or in the proceedings subsequent to its issuing. Of course, the judgment cannot be assailed nor its merits

[44] Ione S. B. v. Blair, 56 Kan. 430; Flaherty v. Cramer (N. J. Ch.), 41 Atl. 482; Gunter v. Cobb, 82 Tex. 598.

Digitized by Google

questioned for error,[45] but it may be shown to be void,[46] or to have been satisfied prior to the sale,[47] and in either of these contingencies, the sale should be set aside. The writ may be assailed either as void or as so irregular that it should be vacated. If it is void, it cannot support any sale based upon it, and the court should remove any apparent cloud created by the sale by vacating it. If the writ is merely irregular in its form or in the time of its issuing, or otherwise, the court may amend instead of vacating it, or may consider the error complained of to be of a character which could have done no injury to the complaining party, and may, therefore, deny him relief, or it may, on the other hand, vacate it or the sale based upon it, or both. This question is, we think, sufficiently considered in what we have heretofore said respecting the quashing of writs.[48]

Courts have sometimes vacated sales because the property sold was a homestead, and therefore exempt from execution;[49] but we apprehend that the question of exemption must ordinarily be presented and determined in some other proceeding.[50]

The failure to give proper notice is a fertile ground for vacating sales, and one which, if promptly made, can never be successfully resisted, because it would scarcely be possible to demonstrate that it had not operated to the prejudice of the moving party.[51] In

[45] Hoover v. Hale, 56 Neb. 67; Krutz v. Batts, 18 Wash. 460.

[46] Dorland v. Hanson, 81 Cal. 202, 15 Am. St. Rep. 44; Peck v. Chambers, 44 W. Va. 270.

[47] Ives v. Rice, 84 Ala. 282; Lyon v. Dees, 84 Ala. 595.

[48] Ante, §§ 73-78.

[49] Milligan v. Cox, 108 Ala. 497; Bach v. May, 163 Ill. 547.

[50] Best v. Zutraven, 53 Neb. 619.

[51] Ante, § 286; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Moreland v. Bowling, 3 Gill, 500; Kauffman v. Walker, 9 Md. 229;

Digitized by Google

some of the states a notice is required to be given the defendant of the intended sale. If so, its omission necessitates the vacation of the sale on his motion.[52]

In Kentucky, if the sale is made in parcels when advertised to be made in gross, or in gross when the notice states that it will be in parcels, it will be vacated, because persons wishing to purchase in parcels would probably not attend a sale which is advertised to be in gross, and persons wishing to purchase in gross would pay no attention to a sale advertised to be in parcels.[53]

A sale may be quashed because made at a wrong place[54] or time;[55] or by an improper officer;[56] or to a person not competent to purchase;[57] or because the property was sold en masse instead of in parcels;[58] or for collusion, combinations, or other devices resorted to for the purpose of suppressing the bidding,[59] or of

Mechanics' Bank v. Pitt, 44 Mo. 364; Fleming v. Maddox, 80 Iowa, 239; Campbell v. Johnston, 4 Dana, 177; Miller v. Lefever, 10 Neb. 77; Jennings v. Carter, 53 Ark. 242; Quarles v. Hiern, 70 Miss. 891; Morris v. Hastings, 70 Tex. 26, 8 Am. St. Rep. 570.

[52] Bernard v. Herzog, 12 Mont. 519; Voorhis v. Terhune, 50 N. J. L. 147, 7 Am. St. Rep. 781; Jensen v. Woodbury, 16 Iowa, 515.

[53] Jarboe v. Colvin, 4 Bush, 70; Hahn v. Pindel, 1 Bush, 540.

[54] Ante, § 290.

[55] Ante, § 287; Wheatley v. Terry, 6 Kan. 427; Miller v. Hull, 4 Denio, 104.

[56] Ante, § 292; Yates v. Woodruff, 4 Edw. Ch. 700.

[57] Ante, § 292.

[58] Ante, § 296; Ames v. Lockwood, 13 How. Pr. 555; McIntyre v. Sandford, 9 Daly, 21; Waldo v. Williams, 2 Scam. 470; White v. Watts, 18 Iowa, 74; Benton v. Wood, 17 Ind. 260; Davis v. Chicago D. Co., 129 Ill. 180; Cohen v. Menard, 31 Ill. App. 503; Power v. Larrabee, 3 N. D. 502, 44 Am. St. Rep. 577.

[59] Ante, § 297; Thomas v. Hite, 5 B. Mon. 597; Pattison v. Josselyn, 43 Miss. 373; Turner v. Adams, 46 Mo. 95; Hogg v. Williams, 1 Grant Cas. 67; Dick v. Lindsay, 2 Grant Cas. 431; Sharp v. Long, 28 Pa. St. 433; Faust v. Haas, 73 Pa. St. 295; Hurt v. Nave, 49 Ala. 459; Stuart v. Brown, 135 Ind. 232.

Digitized by Google

accomplishing some other fraud upon any one of the parties interested in the sale.[60]

A sale may be vacated on account of the misconduct of the officer, or of the plaintiff, or of the defendant, or of the purchaser. Thus, the officer may give the injured party a sufficient ground for avoiding the sale, by either misrepresenting any material fact in regard to the property or the sale;[61] or by making any fraudulent combination with the purchaser;[62] or by continuing to sell after he has sold sufficient property to satisfy the writ;[63] or by refusing to receive a bid;[64] or by oppressively dividing the defendant's real estate, so that the part sold cannot be taken without substantially sacrificing the whole;[65] by not pursuing the directions of the decree, thereby producing a sacrifice of the property;[66] by oppressively holding the sale on a general election day;[67] by unnecessarily selling much more property than was required to satisfy the writ;[68] by refusing to permit the exercise of the defendant's right of selecting what should be sold;[69] by selling under a decree, without awaiting the issue of an order of

[60] Wiggins v. Silverthorn, 10 Wis. 492; Hudson v. Morriss, 55 Tex. 595.

[61] Reed v. Diven, 7 Ind. 189; Seller v. Lingerman, 24 Ind. 264; Ewald v. Coleman, 19 Ind. 66; Auwerter v. Mathiot, 9 Serg. & R. 397; Mobile C. P. v. Moore, 9 Port. 679; Marsh v. Ridgway, 18 Abb. Pr. 262.

[62] Garrett v. Moss, 20 Ill. 549.

[63] Zylstra v. Keith, 2 Desau. 140; ante, § 295.

[64] Parker v. Pratt, 4 Halst. Ch. 104.

[65] Hamilton v. Burch, 28 Ind. 233.

[66] Vanbussum v. Maloney, 2 Met. (Ky.) 550.

[67] King v. Platt, 37 N. Y. 155.

[68] Hicks v. Perry, 7 Mo. 346; Jones v. Davis, 2 Ala. 730; Reed v. Carter, 3 Blackf. 376, 26 Am. Dec. 422; Groff v. Jones, 6 Wend. 522, 22 Am. Dec. 545; Forbes v. Hall, 102 Ga. 47, 66 Am. St. Rep. 152.

[69] Evans v. Landon, 1 Gilm. 307.

Digitized by Google

sale;[70] or by proceeding after notice is given him of a stay of proceedings;[71] or for any abuse of discretion in his mode of conducting the sale, as by subdividing into parcels property that was much more valuable when occupied as a whole,[72] or for selling as a whole a tract that ought to have been divided into parcels.[73]

In Nebraska, it has been held that the representation by the sheriff and the clerk of the court that the sale would vest a perfect title in the purchaser to the property sold does not entitle him to have the sale vacated after confirmation, where the statement of these officers was not the result of any mistake of fact, but respecting the effect of the sale upon pre-existing encumbrances, and the parties to the suit had not joined in the representation, nor been guilty of any fraud, misrepresentation, or other wrong. It was thought that the negligence of the purchaser in not making any investigation concluded him, and that he had no right to rely upon the statements of the clerk and sheriff.[74]

The sale may be vacated for oppression,[75] or fraud on the part of the plaintiff,[76] as where he dissuades persons from bidding;[77] or violates his agreement to postpone a sale;[78] or in person, or through his attorney, misrepresents the defendant's title, and thereby procures a higher bid.[79] The defendant may create a suffi-

[70] Rhonemus v. Corwin, 9 Ohio St. 366.

[71] Campbell v. Smith, 9 Wis. 305; Baasen v. Eilers, 11 Wis. 277.

[72] McLean Co. Bank v. Flagg, 31 Ill. 290, 83 Am. Dec. 224.

[73] Meacham v. Sunderland, 10 Ill. App. 123.

[74] Morton v. Nebraska etc. Co., 35 Neb. 466, 37 Am. St. Rep. 441.

[75] Hopton v. Swan, 50 Miss. 545.

[76] But fraud must always be affirmatively shown. Wallace v. Berger, 25 Iowa, 456.

[77] Mills v. Rogers, 2 Litt. 218, 13 Am. Dec. 263.

[78] Demaray v. Little, 19 Mich. 244.

[79] Dwight's Case, 15 Abb. Pr. 259; Paulett v. Peabody, 3 Neb. 196. Misrepresentations concerning the character or value of the prop-

Digitized by Google

cient ground for vacating the sale by any improper act or device on his part which operates injuriously upon the plaintiff or the purchaser. Hence, the plaintiff is entitled to have a sale quashed, when he was entrapped into making a bid in excess of the value of the property by the defendant's misrepresenting its locality.[80]

In Kentucky, a sale was quashed because a credit to which the defendant was entitled was not indorsed on the writ, the plaintiff being the purchaser.[81] In another case in the same state, the quashing of a sale was refused where a credit was not indorsed, owing to the mistake or oversight of the officer issuing the writ.[82] In this state, it has also been held that an officer has no authority to collect an amount in excess of that required to satisfy the judgment, and that if he exceeds his authority in this respect, the sale is void.[83] But the application of this rule was denied where the excess was trifling, though the plaintiff had purchased.[84] Execution sales have also been quashed on account of accident,[85] mistake,[86] misapprehension,[87] inadvertence,[88] when shown to have operated injuri-

erty, whereby a purchase was induced, have uniformly been regarded as sufficient to justify the court in releasing the purchaser from his bid, and quashing the sale. Laight v. Pell, 1 Edw. Ch. 577; Gordon v. Sims, 2 McCord Ch. 159; Paulett v. Peabody, 3 Neb. 196.

[80] Mulks v. Allen, 12 Wend. 253.

[81] Davie v. Long, 4 Bush, 574.

[82] Williams v. Gill, 6 J. J. Marsh. 487.

[83] Adams v. Keiser, 7 Dana, 208; Morrison v. Bruce, 9 Dana, 211.

[84] Merrill v. Housley, 2 Litt. 277; Southard v. Pope, 9 B. Mon. 263; Tipton v. Grubbs, 2 B. Mon. 83.

[85] Hoppock v. Conklin, 4 Sand. Ch. 582.

[86] Gordon v. Sims, 2 McCord Ch. 159; Cummings' Appeal, 23 Pa. St. 509; Central P. R. R. Co. v. Creed, 70 Cal. 497; Jones v. Carr, 47 Kan. 329; Hoppock v. Cray (N. J. Ch.), 21 Atl. 624. But the mistake must be injurious to the moving party.

[87] Hey v. Schooley, 7 Ohio. pt. 2, p. 48; Allen v. Clark, 36 Wis. 101.

[88] Ontario Bank v. Lansing, 2 Wend. 260; contra, Benedict v. Jones, 18 Hun, 527.

Digitized by Google

ously upon the interest of the complainant; also because the extreme inclemency of the weather prevented the attendance of bidders, and occasioned the sacrifice of the property.[89] "Judicial sales will not be set aside for causes that the parties in interest might, with a reasonable degree of diligence, have obviated. Every intendment will be made to support them. But where the court can see that injustice will be inflicted by the ratification of the sale upon a party not in default, by reason of the carelessness or omission of its own officers, it should interfere to prevent it."[90] When a motion is made to vacate a sale, the burden of proof is upon the applicant.[91]

If a mortgagee agrees with the widow of a deceased mortgagor to foreclose the mortgage, and to bid in the land and pay her a specified price, and he, in violation of such agreement, permits the land to be bid in by another at a much less sum than he agreed to pay, the sale will be vacated.[92] "Any act done by the purchaser, or any other party to the sale, which has the effect to prevent competition, chill the bidding, sacrifice the property, or impose upon the purchaser, is against the policy of the law, and will avoid the sale affected by such conduct."[93] Hence, if parties agree with some of the judgment creditors that if the property is sold to the former for less than enough to satisfy the latter's judgments, they will pay the balance and take an assignment of the judgments, the tendency of this agreement is to stifle competition, and a sale made un-

[89] Roberts v. Roberts, 13 Gratt. 639.
[90] Kauffman v. Walker, 9 Md. 240.
[91] Maynes v. Moore, 16 Ind. 116.
[92] Fix v. Loranger, 50 Mich. 199.
[93] Barrett v. Bath Paper Co., 13 S. C. 128.

Digitized by Google

der its influence must be vacated.[94] A sale will not be vacated for an error in the spelling of defendant's name in the writ and proceedings, if the pronunciation of the name, as spelled in the writ, is substantially the same as if it had been correctly spelled, as where the property of Rosina Kuhns is sold under proceedings against her by the name of Rosina Coons.[95] A sale otherwise fair and regular will not be vacated because there were no bidders present other than the plaintiff, who bid in the property for himself.[96] A party cannot procure the vacation of a sale if he contributed to the injury complained of, as where he forbade the sale, and thereby prevented the property from selling at a fair price.[97] When the judgment on which the execution and sale were based is reversed, the sale may be vacated, on motion, if the title under the purchase is held by plaintiff, or his attorney.[98]

§ 309. Inadequacy in the Price Realized is very frequently sought to be asserted, either by bill in equity or by motion, as a ground for vacating an execution sale. We have considered this topic in the preceding chapter, in treating of causes for denying the confirmation of chancery sales. Courts hesitate to declare that inadequacy of price, however gross, will of itself justify the vacation of an execution or judicial sale. Authorities are very numerous declaring in general terms that a sale will not be vacated for mere inadequacy of

[94] Barrett v. Bath Paper Co., 13 S. C. 128.
[95] Kuhn v. Kilmer, 16 Neb. 699.
[96] Learned v. Geer, 139 Mass. 31.
[97] Atcheson v. Hutchison, 51 Tex. 234; Hausling v. Hausman, 73 Cal. 276.
[98] Hayes v. Cassell, 6 Chic. L. N. 183.

Digitized by Google

price.[99] Other authorities, without venturing upon any extreme position, content themselves with the general assertion that inadequacy of price can rarely, if ever, justify the vacation of an execution sale.[100] But occasional cases of great hardship arise, and result in the questioning of the general rule that inadequacy alone is not sufficient to warrant the vacation of a sale; or, if the rule is not questioned, the court will, at least, look anxiously for some reason whereby, without disputing the general rule, it may justify itself in declaring that the rule is not applicable to the case before it.

[99] Newton v. State Bank, 22 Ark. 19; White v. Floyd, Spears Eq. 351; Reed v. Brooks, 3 Litt. 127; Mercreau v. Prest, 2 Green Ch. 460; Strong v. Catton, 1 Wis. 471; Coleman v. Bank of Hamburg, 2 Strob. Eq. 285, 49 Am. Dec. 671; Waller v. Tate, 4 B. Mon. 534; Hammond v. Scott, 12 Mo. 8; Randolph v. Thomas, 23 Ark. 69; West v. Davis, 4 McLean, 241; Parker v. H. & St. J. R. R. Co., 44 Mo. 415; Bank of N. B. v. Hassert, 1 Saxt. Ch. 1; Roe v. Ross, 2 Ind. 99; Craig v. Garnett, 9 Bush, 97; Simmons v. Vandegrift, 1 Saxt. Ch. 55; Judge v. Wilkins, 19 Ala. 765; Gibbons v. Bressler, 61 Ill. 110; Watt v. McGalliard, 67 Ill. 513; Carson's Sale, 6 Watts, 140; Cooper v. Galbraith, 3 Wash. C. C. 546; Ashbee v. Cowell, 1 Busb. Eq. 158; Baker v. Clepper, 26 Tex. 629, 84 Am. Dec. 591; Tripp v. Cook, 26 Wend. 143; Meir v. Zelle, 31 Mo. 331; Cowen v. Stevens, 3 Harr. (Del.) 494; Miller v. Fraly, 21 Ark. 22; Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; Benton v. Shreeve, 4 Ind. 66; Curd v. Lackland, 49 Mo. 451; Taylor v. Eckford, 11 Smedes & M. 21; Drake v. Collins, 5 How. (Miss.) 253; Clement v. Reed, 9 Smedes & M. 535; Nix v. Draughan, 56 Ark. 240; Fry v. Street, 44 Ark. 562; Peterson v. Little, 74 Iowa, 223; Scott v. Scott, 85 Ky. 385; Cake v. Cake, 156 Pa. St. 47; Hollister v. Vanderlin, 165 Pa. St. 248, 44 Am. St. Rep. 657; Felton v. Felton, 175 Pa. St. 44; Carson v. Ambrose, 183 Pa. St. 88; Stroup v. Raymond, 183 Pa. St. 279, 63 Am. St. Rep. 758; Deadwood First N. B. v. Black Hills F. Asso., 2 S. D. 145; Smith v. Perkins, 81 Tex. 152, 26 Am. St. Rep. 794.

[100] Pickering v. Driggers, 59 Ill. 65; McMullen v. Gable, 47 Ill. 67; Comstock v. Purple, 49 Ill. 158; Gibbons v. Bressler, 61 Ill. 110; Bertenshaw v. Moffit, 6 Ind. 464; Sowle v. Champion, 16 Ind. 165; Cushwa v. Cushwa, 5 Md. 55; Pridgen v. Adkins, 25 Tex. 388. A sale will not be vacated solely because but few bidders were present. Hudgins v. Lanier, 23 Gratt. 494; Learned v. Geer, 139 Mass. 31.

Digitized by Google

Where the inadequacy is palpable, the purchaser can retain his advantage only by showing that the proceedings are free from fault or irregularity. If the inadequacy can be connected with or shown to result from any mistake, accident, surprise, misconduct, fraud, or irregularity, the sale will generally be vacated,[101] un-

[101] Morris v. Robey, 78 Ill. 462; Taul v. Wright, 45 Tex. 388; Chamblee v. Tarbox, 27 Tex. 140, 84 Am. Dec. 614; Pearson v. Hudson, 52 Tex. 352; Grede v. Dannenfelser, 42 Wis. 78; Beedle v. Mead, 81 Mo. 297; Weir v. Travelers' Ins. Co., 32 Kan. 325; Seaman v. Riggins, 1 Green Ch. 214, 34 Am. Dec. 200; Howell v. Hester, 3 Green Ch. 266; Bixly v. Mead, 18 Wend. 611; Lashley v. Cassell, 23 Ind. 600; Allen v. Stephanes, 18 Tex. 658; Lefevre v. Laraway, 22 Barb. 167; Nelson v. Brown, 23 Mo. 18; Parker v. H. & St. J. R. R. Co., 44 Mo. 415; King v. Tharp, 26 Iowa, 283; Kloepping v. Stellmacher, 21 N. J. Eq. 328; Bank of Alexandria v. Taylor, 5 Cranch C. C. 314; Campau v. Godfrey, 18 Mich. 27, 100 Am. Dec. 133; Hazard v. Hodges, 17 N. J. Eq. 123; Griffith v. Hadley, 10 Bosw. 587; Aldrich v. Maitland, 4 Mich. 205; Hamilton v. Quimby, 46 Ill. 90; Cook v. Jenkins, 30 Iowa, 452; Nesbitt v. Dallam, 7 Gill & J. 494; Booth v. Webster, 5 Harr. (Del.) 129; Eberhart v. Gilchrist, 3 Stock. 167; Bethel v. Sharp, 25 Ill. 173, 76 Am. Dec. 790; Bunts v. Cole, 7 Blackf. 265. 41 Am. Dec. 226; Wetzler v. Schaumann, 24 N. J. Eq. 60; May v. May, 11 Paige, 201; Williamson v. Dale, 3 Johns. Ch. 290; Lee v. Davis, 16 Ala. 516; Williams v. Woodruff, 1 Duvall, 257; Blight v. Tobin, 7 B. Mon. 612, 18 Am. Dec. 219; Howell v. Baker, 4 Johns. Ch. 118; Boyd v. Ellis, 11 Iowa, 97; Reynolds v. Nye, Freem. Ch. 462; Cummins v. Little, 16 N. J. Eq. 48; Johnston's Adm'r v. Shaw, 33 Tex. 585; Ballard v. Anderson, 18 Tex. 377; Tiernan v. Wilson, 6 Johns. Ch. 411; Cowgill v. Cahoon, 3 Harr. (Del.) 23; Hodgson v. Farrell, 15 N. J. Eq. 88; Stout v. Brown, 64 Ark. 96; Lawyers' C. P. Co. v. Bennett, 34 Fla. 302; Gunn v. Slaughter, 83 Ga. 124; Bullen v. Dawson, 139 Ill. 633; Bach v. May, 163 Ill. 547; Lurton v. Rodgers, 139 Ill. 554, 32 Am. St. Rep. 214; Smith v. Huntoon, 134 Ill. 24, 23 Am. St. Rep. 646; Wright v. Dick, 116 Ind. 538; Detwiller v. Schultheis, 122 Ind. 155; Fletcher v. McGill, 110 Ind. 395; Branch v. Foust, 130 Ind. 538; Sioux City L. Co. v. Walker, 78 Ia. 476; Wood v. Drury, 56 Kan. 409; Jones v. Carr, 41 Kan. 329; Means v. Roseyear, 42 Kan. 377; Bean v. Haffendorfer, 84 Ky. 685; Hall v. Moore, 70 Miss. 75; Daly v. Fly, 51 N. J. Eq. 104; Ritter v. Getz, 161 Pa. St. 648; Stone v. Day, 69 Tex. 13, 5 Am. St. Rep. 17; Martin v. Anderson, 4 Tex. Civ. App. 111; Schmidt v. Burnett (Tex. Civ. App.), 23 S. W. 228; Leeper v. O'Donohue, 18 Tex. Civ. App. 531; Schroeder v. Young, 161 U. S. 334.

Digitized by Google

less the complainant was himself in fault,[102] or the rights of innocent third parties have become dependent on the sale.[103] Thus, if the defendant or other party seeking to vacate a sale, being present thereat, made announcements tending to show that the title was defective, or that the purchaser would meet with resistance if he attempted to assert title founded upon the sale, and the result was that bidding was discouraged and a sale made for an inadequate price, he is not, on that account, entitled to have it vacated.[104] Hence, inadequacy of price may always be taken into consideration when connected with any other fact tending to show that the sale ought not to be permitted to stand.[105] It is sometimes said that inadequacy may be so gross as of itself to create the presumption that it must have resulted from some fraudulent practice for which the purchaser is responsible, and on account of which he will not be suffered to retain his purchase.[106] This opinion prevails in Maryland, as will be seen from the following extract from a decision made in that state: "Inadequacy of price, in combination with circumstances calculated to cast doubt or suspicion on the correctness of the sale, is a strong auxiliary argu-

[102] Law v. Smith, 4 Ind. 55; Bullard v. Green, 10 Mich. 268; Parkhurst v. Cory, 3 Stock. 233; Daniel v. McHenry, 4 Bush, 277.

[103] Dawson v. Jackson, 62 Ind. 171.

[104] Blum v. Rogers, 71 Tex. 668; Vieno v. Gibson (Tex. Civ. App.), 20 S. W. 717.

[105] Cubbage v. Franklin, 62 Mo. 364; Beckwith v. King's M. M. Co., 87 N. C. 155; Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; Benton v. Shreeve, 4 Ind. 66; O'Brien v. Hilburn, 22 Tex. 616; Curd v. Lackland, 49 Mo. 451; Taylor v. Eckford, 11 Smedes & M. 21; Warren v. Stinson, 6 N. D. 273.

[106] Duncan v. Sanders, 50 Ill. 475; Boyd v. Hudson C. A. S., 24 N. J. Eq. 349; Knoop v. Kelsey, 121 Mo. 642; Davis v. McCann, 143 Mo. 172.

Digitized by Google

ment against the sale. But standing alone, it is insufficient to authorize an interference with a sale, unless it is so inordinate as to indicate some mistake or unfairness, for which the purchaser is responsible, or misconduct or fraud in the trustee to whom the management of the sale has been committed." [107]

Some of the decisions take a more advanced position, and maintain that inadequacy of price, even disconnected from other circumstances tending to show fraud or mismanagement, is, when of so gross a character as to operate substantially as a sacrifice of the property, a sufficient ground for vacating a sale.[108] "When the inadequacy is so glaring and gross as at once to shock the understanding and conscience of an honest and just man, it will, of itself, authorize the court to set aside the sale. For instance, if, as in the

[107] Warfield v. Ross, 38 Md. 92; Johnson v. Dorsey, 7 Gill, 269; Allen v. Clark, 36 Wis. 101; Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660; House v. Walker, 4 Md. Ch. 62; Horsey v. Hough, 38 Md. 130; Glenn v. Clapp, 11 Gill & J. 1. A sale cannot be collaterally avoided for inadequacy of price. Elston v. Castor, 101 Ind. 426, 51 Am. Rep. 754.

[108] Garrett v. Moss, 20 Ill. 549; Kinney v. Knoebel, 51 Ill. 112. But in this state it is now settled that inadequacy of price is never per se sufficient to justify the vacation of a sale where the defendant has the right of redemption. Mixer v. Sibley, 53 Ill. 61. This seems to be a very reasonable view of the matter. For where the right of redemption exists, the consequences of a sale at an inadequate price need not be serious; and the fact that no redemption is offered to be made induces the presumption that the price could not have been so extremely inadequate as to warrant the interposition of the court. But in Pennsylvania, a reverse view seems to obtain. For it is there declared that a sale of realty may sometimes, but a sale of personalty never, be set aside for inadequacy. Swires v. Brotherline, 41 Pa. St. 135, 80 Am. Dec. 601. In Virginia, inadequacy of price, though not extreme in its character, will occasion the vacation of sales made under decrees. Teel v. Yancey, 23 Gratt. 691; Hudgins v. Lanier, 23 Gratt. 194; Sinnett v. Cralle, 4 W. Va. 600.

Digitized by Google

case under consideration, a tract of land of the value of eighteen hundred dollars is sold for five dollars, the court out of which the execution issued should not hesitate to set aside the sale for this cause alone."[109] These cases proceed upon the principle that there are circumstances in which an officer conducting a sale should adjourn it to some subsequent time because of the great disparity between the amount bid and the value of the property, and that if he fails to do so, the court may, in effect, correct his error by vacating the sale.[110] In New York, inadequacy alone will not justify the action of a court of equity upon a bill brought to procure the vacation of a sale. Thus, in determining the various questions presented for his consideration in the case of March v. Ludlum,[111] the assistant vice-chancellor said: 1. "As to the inadequacy: this is unquestionably very great, for the property sold for less than one-twentieth of its value. But I do not understand that the court of chancery can, on this ground alone, set aside a public sale made by an officer who is not acting under the direction of the court. Instances of greater inadequacy are of constant occurrence in sales for taxes and assessments, made by our state and municipal authorities. The exercise of such a jurisdiction would, I imagine, be more startling to the public mind than any supposable inadequacy of price would be to the mind of the court. Over judicial sales made by its own officers, the court of chancery

[109] Henderson v. Sublett, 21 Ala. 630; reaffirmed in Lankford v. Jackson, 21 Ala. 650, where lands valued at one thousand dollars had been sold for six hundred dollars. See also Surget v. Byers, Hemp. 715; Clark v. Glos, 180 Ill. 356.

[110] Rogers & B. H. Co. v. Cleveland B. Co., 132 Mo. 442, 53 Am. St. Rep. 494.

[111] 3 Sand. Ch. 50.

Digitized by Google

has always exercised a summary control by motion or petition. But even in those cases the court will not interfere on the ground of inadequacy alone.[112] There must be some surprise, accident, fraud, or similar cause, other than the neglect of the party interested, or his inability to raise the money, to induce an order for a resale when the sale is made by its own officers and under its own process or decrees. Under any other rule, confidence in such sales would be entirely dissipated, and the final result would be, that creditors would become the purchasers on their own terms." Notwithstanding what is here said, we think the better rule is that inadequacy of price may be so gross as to create the presumption of fraud or misconduct on the part of the officer or the purchaser. That it may be so treated in equity we have already shown,[113] and we think that, on motion to vacate a sale under execution promptly made, the same principle must prevail at law, though its announcement is avoided by giving effect to any excuse or irregularity suggested by the moving party, however flimsy and unimportant.

If it is the defendant who moves to vacate the sale because of inadequacy of price, the fact that the sale is subject to redemption is well nigh conclusive against his contention. By redeeming, he can terminate the effect of the sale, and his failure to redeem must ordinarily be regarded as more persuasive than any evidence which he may offer respecting the supposed inadequacy of price, and hence, he will ordinarily be denied relief where he retains the right to redeem, or where, though he does not retain it, he permitted the

[112] American Insurance Co. v. Oakley, 9 Paige, 259; Brown v. Frost, 10 Paige, 243; Tripp v. Cook, 26 Wend. 143.

[113] Ante, § 304 i.

Digitized by Google

time within which he might have redeemed to expire without exercising his right, unless he can show some adequate excuse for his inaction.[114] A judgment debtor must anticipate that, unless he satisfies the judgment, the plaintiff will undertake to compel such satisfaction by a sale of property, and hence, such judgment debtor can rarely remain ignorant of a sale without being guilty of such laches as bar his claim to relief. If, however, there are special circumstances which will exonerate the defendant in execution from the charge of laches in being ignorant of a sale, or, if he who seeks relief is not the defendant in execution, but some person claiming under him, and having no knowledge of the judgment or sale, the failure to exercise the right of redemption does not necessarily preclude him from seeking relief from a sale on the ground of gross inadequacy of price, or, what is much the same, permitting the right to redeem therefrom to be exercised, though the time fixed therefor by the statute has terminated.[115]

§ 310. Whether Vacation should be Sought by Motion or by Bill in Equity.—As a general rule, the aid of equity cannot be invoked by any person having a speedy and adequate remedy at law. No doubt an execution sale may be vacated by motion made to the court and in the case whence the writ issued. This remedy is always more speedy, and is usually as adequate as any which can be pursued by an independent proceeding in equity.[116] Where a sale is sought to be vacated for any

[114] Griffith v. Milwaukee H. Co., 92 Ia. 634, 54 Am. St. Rep. 573; Power v. Larrabee, 8 N. D. 502, 44 Am. St. Rep. 577; Warren v. Stinson, 6 N. D. 293.

[115] Warren v. Stinson, 6 N. D. 293.

[116] Warren v. Stinson, 6 N. D. 293.

Digitized by Google

irregularity in the writ, or in the proceedings of the officer in executing the writ, application ought to be made to the court issuing the writ, and, if made elsewhere, ought not to be entertained. "If there be legal grounds for quashing the sale and deed, they should be presented in the common-law court which has power over these proceedings." [117] The same rule prevails in chancery. "If the master sells at an improper time, or in such a manner as to prevent a fair competition, or if, for any other cause, it would be inequitable to permit the sale to stand, the proper remedy is by a summary application to the court, in the suit in which the decree was made, for a resale of the premises upon such terms and conditions as may be just, so as to protect the rights of the purchaser as well as the rights of the parties interested in the sale. And it would seriously affect the interests of those whose property is sold by masters under decrees of this court, if it was understood that questions of this kind were to be litigated and determined in a collateral suit. For no man of ordinary prudence would bid what he believed to be the fair cash value of the property at a master's sale, if he would be subjected to the expense and delay of a protracted chancery suit to determine whether the proceedings of the master had been strictly regular." [118]

The jurisdiction of courts of equity has always been considered as specially adapted to the investigation of fraudulent devices of every character, and to extend-

[117] Cassiday v. McDaniel, 8 B. Mon. 519; Prather v. Hill, 36 Ill. 402; Boles v. Johnston, 23 Cal. 226, 83 Am. Dec. 111; Gould v. Mortimer, 16 Abb. Pr. 448; 26 How. Pr. 167; Gardner v. Mobile etc. R. R. Co., 102 Ala. 635, 48 Am. St. Rep. 635; Starr v. United States, 8 App. D. C. 552.

[118] Brown v. Frost, 10 Paige, 246.

Digitized by Google

ing appropriate relief when the existence of those devices has been discovered. So, too, it has long been sought for the purpose of obtaining redress in cases of accident, surprise, or mistake. These courts have not, however, exclusive control over cases of fraud or accident. Their jurisdiction is often concurrent with that of courts of law.[119] Hence, where grounds exist for vacating a sale, which rest not in irregularity of proceeding, but in fraudulent devices practiced upon the complainant, or in accident or mistake for which he has suffered, and from which he is entitled to relief, he may, before conveyance is made to the purchaser, proceed either by motion in the original case or by bill in equity.[120] In this, however, as in other matters within the concurrent jurisdiction of law and equity, the choice and propriety of remedy are governed by considerations of adequacy and expediency; and since the importance of these considerations depends quite usually upon the circumstances of the case in hand, it is impossible to deduce from the cases an inflexible rule determining the proper choice of remedy where the end sought is the vacation of an execution sale. The proper criterion for determining this matter is found in the nature of the questions, and the character of the issue, which must be weighed and decided before the relief sought can be granted or denied. Fraud, mistake, irregularities and inadequacy of price may justify the setting aside of an execution sale upon motion;[121] but the nature of the proceeding by motion renders it applicable with propriety only to a minority of the

[119] 1 Story's Eq. Jur., § 60.

[120] Woody v. Jameson (Idaho), 50 Pac. 1008.

[121] Wilson v. Aultman etc. Co. (Tex. Civ. App.), 39 S. W. 1103; Starr v. United States, 8 App. D. C. 552.

Digitized by Google

cases where such grounds for vacation are set forth. If a conveyance has been executed, and the purchaser thereby vested with the legal title, it is doubtful whether he can be divested of it by motion. If the charge is that the sale ought to be vacated for matters not apparent from an inspection of the proceedings, such as combination to depress the bidding, or any other species of fraud, or for any misconduct on the part of the officer conducting the sale, the better opinion is that the purchaser's title cannot be divested otherwise than by an independent suit in equity against him.[122]

Lapse of time may render the remedy by motion improper, and compel recourse to equity, according to the Mississippi rule which limits the time within which a court of law may set aside an execution sale upon motion to the return term of the execution.[123]

Where the facts are plain, simple, and uncontroverted, and the relief sought can be had by the order of the court upon motion, it is not necessary that a party should be driven to the expense and delay of a suit in equity.[124] Upon the hearing of the motion in such a case, the court may, perhaps, in the exercise of its discretion, hear or disallow evidence.[125] It is manifest, however, that, since such motions are usually tried upon affidavits, a recourse to equity is imperative where questions are raised which cannot be properly

[122] Harrell v. Word, 54 Ga. 649; State Bank v. Noland, 13 Ark. 299; Jenkins v. Merriweather, 109 Ill. 647; McMinn v. Phipps, 3 Sneed, 196; Anniston P. Works v. Williams, 106 Ala. 324, 54 Am. St. Rep. 51.

[123] Hopson v. Swan, 50 Miss. 545; Hall v. Moore, 68 Miss. 527.

[124] Starr v. United States, 8 App. D. C. 552, 559.

[125] Harrison v. Andrews, 18 Kan. 535; Aultman v. Humphrey (Kan. App.), 53 Pac. 789.

Digitized by Google

determined upon the hearing of a motion.[126] In illustration of this is a recent Alabama case in which the court said: "On the motion of the movants and the proofs introduced, it is evident that the sale should be set aside; but from the answer to the motion and the evidence introduced, it appears that the sheriff has executed a deed to the purchasers of the lots in question, which a court of law has no power to annul, and that the purchasers have rightfully paid out considerable sums of money in paying taxes and removing liens on the property which should be refunded or secured to them. It would be manifestly inequitable, and contrary to well-established rules on the subject, to set aside the sale, without refunding to them the money they have paid out, and placing them in statu quo. These facts give rise to questions which can be properly determined only in a court of equity, and which must be adjudicated before the movants are entitled to have the sale set aside." [127]

§ 310a. The Effect of the Absolute Vacating of an Execution or Judicial Sale necessarily is, with respect to the parties before the court and bound by its adjudication, to deprive them of all rights and titles founded upon the sales so vacated, and hence, for their continued possession of, or interference with, the property which was the subject of the sale they may be held answerable as trespassers.[128] If the proceeding seeking the vacation of a sale is by an independent suit in equity, the court will not grant relief except upon con-

[126] Warren v. Stinson, 6 N. D. 293, 305.

[127] Anniston Pipe Works v. Williams, 106 Ala. 324, 54 Am. St. Rep. 51.

[128] Scranton v. Ballard, 64 Ala. 402; Green v. Jordan, 83 Ala. 220, 3 Am. St. Rep. 711.

Digitized by Google

dition that the complainant do equity upon his part;[129] and it may, therefore, decline to set aside the sale against the purchaser except upon his being indemnified not only for the amount of his bid, but also for the reasonable value of improvements made by him upon the property, when they are such as a prudent purchaser thereof would make in the use and management of the property.[130] The purchaser whose sale is sought to be vacated, if he is also the judgment creditor, may, by cross-bill, enforce his judgment and the lien thereof, and the decree granting relief may also order the resale of the property for the satisfaction of the judgment.[131]

§ 311. Confirming Sales under Execution.—In a few of the states, the proceedings of the officer making a sale under execution are reported to the court for its confirmation or disapproval. It must be remembered that there is a vast difference between execution sales and those made under decrees of chancery or probate courts in respect to the rights of the purchasers and the powers of the courts. In sales made under decrees, and which may, therefore, properly be called "judicial sales," when the proceedings are reported to the court the purchaser is simply a preferred bidder.[132] The court is not bound to accept the bid, and may, in its discretion, refuse to confirm the sale for many reasons which would have no application where the purchase was made under an execution. When an execution

[129] Bynum v. Govan, 9 Tex. Civ. App. 559; House v. Robertson, 89 Tex. 681.

[130] Lynum v. Smoot (Ky.), 11 S. W. 17.

[131] Blackburn v. Clark, 85 Tenn. 506.

[132] Taylor v. Gilpin, 3 Met. (Ky.) 544; Busey v. Hardin, 2 B. Mon. 411; Dale v. Shirley, 5 B. Mon. 492; Childress v. Hunt, 2 Swan, 487; Mitchell v. Harris, 43 Miss. 314; ante, § 304 a.

Digitized by Google

sale is reported, the court examines only the proceedings of the officer after the receipt of the writ,[133] and in this examination seems to be restricted to the inspection of his official return,[134] and the papers connected therewith. The failure to ask for confirmation does not, in some of the states, avoid the sale, nor prevent a conveyance in pursuance thereof from divesting the defendant's title, nor render it subject to collateral attack.[135]

If there is any irregularity in the rendition or entry of the judgment, or in the issuing of the execution, it must be taken advantage of otherwise than by objecting to the confirmation of the sale. The confirmation of a sale does not divest title nor dispense with the necessity for the execution of a deed.[136] The deed and the confirmation are both essential to the transfer of the title. A conveyance made under a chancery [137] or probate [138] sale, in the absence of an order confirming such sale, is undoubtedly void. This rule is equally applicable to a conveyance made under an unconfirmed execution sale, in a state where such sales are required to be reported to and approved by the

[133] Koehler v. Ball, 2 Kan. 160, 83 Am. Dec. 451; Challiss v. Wise, 2 Kan. 193; Buckingham v. Granville A. Soc., 2 Ohio, 360; Glauque's Rev. Stats. Ohio, 7th ed., § 5398.

[134] White Crow v. White Wing, 3 Kan. 276; Briggs v. Tye, 16 Kan. 291.

[135] Warren v. Stinson, 6 N. D. 293; Baxter v. O'Leary, 10 S. D. 150, 66 Am. St. Rep. 702.

[136] Webster v. Hill, 3 Sneed, 333; Leshey v. Gardner, 3 Watts & S. 314, 38 Am. Dec. 764; Erb v. Erb, 9 Watts & S. 147.

[137] Williamson v. Berry, 8 How. 496; Henderson v. Herrod, 23 Miss. 434; Gowan v. Jones, 10 Smedes & M. 164; Dickerson v. Talbot, 14 B. Mon. 60; ante, § 304 a.

[138] Rawlings v. Bailey, 15 Ill. 178; Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566; Wallace v. Hall, 19 Ala. 367; Young v. Keogh, 11 Ill. 642; Ayres v. Baumgarten, 15 Ill. 444.

Digitized by Google

court.[139] In another respect, judicial and execution sales are similar. The court must, whether the sale be of the one class or the other, either reject or confirm. It cannot modify the terms of the sale, nor can it declare that a person other than the one reported to the court as such was the successful or best bidder.[140] If dissatisfied with the sale as reported, the only action which the court can take is to disaffirm or vacate the sale, and direct that another be made. An execution sale may be confirmed on the motion of any person interested, or by the court on its own motion.[141]

Confirmation ought to be refused when it appears that the officer did not comply with the statute, as where he sold real estate without first seeking personal property,[142] or at a time other than that fixed by the court,[143] or where he violated the spirit, though not the letter, of the statute, by giving notice of the sale in an obscure newspaper of little circulation,[144] or where the notices of the sale were not properly posted.[145] A purchaser cannot successfully resist the confirmation on the ground that there has been unnecessary delay, and the property has, in the meantime, depreciated in value, unless he protested against such delay.[146] Such objections to a sale as can be asserted in that manner ought to be made by opposition

[139] McBain v. McBain, 15 Ohio St. 337, 86 Am. Dec. 478; Curtis v. Norton, 1 Ohio, 278; Yeazel v. Einspahr, 40 Neb. 432.

[140] Kinnear v. Lee, 28 Md. 488; Ohio Life Ins. Co. v. Goodin, 10 Ohio St. 557.

[141] Ferguson v. Tutt, 8 Kan. 370; Deputronn v. Young, 124 U. S. 241.

[142] Koehler v. Ball, 2 Kan. 160, 83 Am. Dec. 451.

[143] Tompkins v. Tompkins, 39 S. C. 537.

[144] Craig v. Fox, 16 Ohio, 563.

[145] Roger v. Ocheltree, 4 Houst. 452.

[146] Mayer v. Wick, 15 Ohio St. 548.

Digitized by Google

to its confirmation;[147] for, if not made thus, or if made thus and overruled, the order of confirmation seems to have the force of a judgment, and to estop the parties from any collateral assertion of the alleged irregularities.[148] The confirmation cannot, however, cure infirmities in the judgment itself.[149]

Whether the exemption of the property is a proper subject of consideration upon motion to confirm an execution sale is a question which has been but infrequently considered. If a sale may be refused confirmation on the ground that the property sold was exempt therefrom, the granting of an order of confirmation might involve an adjudication, actual or presumed, that the property sold was not exempt from such sale. We think the better opinion is, that the right of exemption, where claimed, should be left for determination in some subsequent action to recover the property sold, or to otherwise determine its title, and hence, that the confirmation of the sale of real property does not estop its owner from contending, in a subsequent action, that it constituted a homestead, and was, therefore, not subject to execution sale.[150]

The officer should retain the proceeds of the sale until it is confirmed.[151] In Kansas, the action of a court in reference to confirming a sale may be corrected by appeal.[152] In Ohio, it must be reviewed by a petition

147 Gayle v. Fattle, 14 Md. 69.

148 Willis v. Nicholson, 24 La. Ann. 545; Cockey v. Cole, 28 Md. 276, 92 Am. Dec. 684; Hotchkiss v. Cutting, 14 Minn. 537; Wilcox v. Raben, 24 Neb. 368, 8 Am. St. Rep. 207.

149 Willamette R. E. Co. v. Hendrix, 28 Or. 485, 52 Am. St. Rep. 800.

150 Schirbar v. Platt, 19 Neb. 625; Best v. Zutavern, 58 Neb. 619.

151 Stone v. Ruffin, 2 Ohio, 503.

152 Koehler v. Ball, 2 Kan. 160, 83 Am. Dec. 451; Moore v. Pye, 10 Kan. 246.

Digitized by Google

in error.[153] The confirmation or vacating of execution sales is a matter usually within the discretion of the trial court, and, while its action may be reviewed and its manifest errors corrected by appropriate appellate proceedings, still, where the question is one of discretion, the action taken by the lower court must necessarily be sustained, unless clearly arbitrary or capricious, or involving an abuse of its discretionary power.[154]

§ 312. Of the Certificate of Sale and Assignments Thereof.—In those states where the defendant is allowed a stated period after the sale in which to redeem the property, the officer is usually required to execute and deliver to the purchaser a certificate of the sale, and to file a duplicate thereof in the office of the county recorder. This certificate should show the parties to the suit, the date and amount of the judgment, the date of the sale, the amount paid, the name of the purchaser, and the time within which redemption may be made. It need not be acknowledged by the officer in order to entitle it to record.[155] The provision of the statute requiring the recording of the certificate is no doubt intended for the protection of subsequent purchasers and encumbrancers; and there may be instances in which, for want of such recording, the sale may become inoperative as against such purchasers or encumbrancers.[156] But as most judgments under which real estate is sold are docketed as liens against the defendant, and as the levy of the execution is usually made a matter of record by filing a notice

153 Reeves v. Skenett, 13 Ohio St. 574.
154 Stroup v. Raymond, 183 Pa. St. 279, 63 Am. St. Rep. 758.
155 Knowlton v. Ray, 4 Wis. 288.
156 Bowers v. Arnoux, 33 N. Y. Sup. Ct. 530.

Digitized by Google

thereof with the county recorder, a sale of real estate can hardly be made without there being sufficient notice thereof to put purchasers on inquiry, independent of the recording of the certificate of sale. Where a long period elapses after the notice of the levy is given third persons may well be justified in presuming that it was not followed by a sale, unless they find the certificate on record. But we apprehend that the failure to file a certificate immediately after the sale would not afford an opportunity for the defendant to destroy the purchaser's title by a transfer to a stranger to the suit. At all events, unless considered with reference to the rights of purchasers without notice, the provisions of law requiring the making and recording of the certificate are directory merely. A noncompliance with such provisions does not affect the validity of the sale.[157] Variances between a certificate of sale and the execution or judgment upon which it is founded and defects in the description of the property sold can rarely, if ever, be of any serious consequence.[158]

§ 313. Assignments of Certificates of Purchase.— The rights held by the purchaser under his certificate of sale may be assigned by him, so as to vest in the assignee the right to receive a deed in his own name.[159]

[157] Jackson v. Young, 5 Cow. 269; Barnes v. Kerlinger, 7 Minn. 82; O'Brien v. Hashagen, 20 Hun, 564.

[158] Chicago D. Co. v. Kinzie, 93 Ill. 415; Holman v. Gill, 107 Ill. 467; Bartleson v. Thompson, 30 Minn. 161.

[159] Blount v. Davis, 2 Dev. 19; Testerman v. Poe, 2 Dev. & B. 103; Splahn v. Gillespie, 48 Ind. 397; McClure v. Engelhardt, 17 Ill. 47; Bank of United States v. Voorhees, 1 McLean, 221; Thompson v. McManama, 2 Disn. 213; Frizzle v. Veach, 1 Dana, 212; Small v. Hodgen, 1 Litt. 16; Jamison v. Tudor, 3 B. Mon. 357; Brooks v. Ratcliff, 11 Ired. 321; Campbell v. Baker, 6 Jones, 255; Ehleringer v. Moriarty, 10 Iowa, 78; McCrady v. Brisbane, 2 Nott & McC. 104; 9 Am. Dec. 676.

Digitized by Google

The assignment is usually accomplished by an instrument in writing purporting to transfer the certificate of sale. A deed of the property, or of all the purchaser's interest therein,[160] or a sale and conveyance under execution against the purchaser, would produce the same result.[161] Upon the death of the holder of a certificate of purchase, the conveyance must be made to his heirs [162] or devisees, or to his executor or administrator, in trust for such heirs or devisees.[163] In Mississippi a deed made to a person other than the purchaser at the sale was presumed, after the lapse of fifteen years, to have been authorized by an assignment of the bid or certificate.[164] We doubt the correctness of this decision, unless the deed purported to be made to an assignee, in which case the recital in the deed would be prima facie evidence of the existence and validity of the assignment.[165] A conveyance to one who was not the purchaser is void unless authorized by an assignment.[166] If an assignment is made for collateral security, and the debt secured is paid, a conveyance thereafter made to the assignee is void in his hands, and in the hands of all persons deriving title under him with notice.[167] If the judgment debtor takes an assignment of the certificate of purchase, his act amounts to no more than redeeming

[160] Green v. Clark, 31 Cal. 591; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151; Leonard v. Flynn, 89 Cal. 535, 23 Am. St. Rep. 500.

[161] Wright v. Douglass, 2 N. Y. 373.

[162] Swink v. Thompson, 31 Mo. 336; Boone v. Moore, 14 Mo. 420.

[163] Reynolds v. Darling, 42 Barb. 418.

[164] Cooper v. Granberry, 33 Miss. 117.

[165] Trotter v. Nelson, 1 Swan, 7; Smith's Case, 4 Nev. 254, 97 Am. Dec. 531.

[166] Morgan v. Hannah, 11 Humph. 122; Carpenter v. Sheriff, 6 Chic. L. N. 361.

[167] Baber v. McLellan, 30 Cal. 135.

Digitized by Google

the property.[168] In New York certain formalities are prescribed by law for the assignment of certificates of sale. Without complying with these, the assignee cannot compel the execution of the deed to him.[169] They are intended for the protection of the officer. He may waive them, in which case his conveyance is valid, if the assignment is sufficient, independent of the statute.[170] Though a chancery sale is confirmed, and a conveyance directed to be made to a person designated in the order of confirmation, this person may vest his right in another. The contract is not personal in the sense that the purchaser cannot authorize another to receive its benefits. Hence, he may order the conveyance to be made to a third person, and if so made it is valid.[171]

[168] McCarty v. Christie, 13 Cal. 79.

[169] People v. Ransom, 2 N. Y. 490.

[170] Phillips v. Schiffer, 7 Lans. 347; Wood v. Morehouse, 45 N. Y. 368; Bank of Vergennes v. Warren, 7 Hill, 91; Chautauqua Bank v. Risley, 4 Denio, 484; People v. Ransom, 4 Denio, 147.

[171] Campbell v. Baker, 6 Jones L. 255; Ward v. Lowndes, 96 N. C. 367.

Digitized by Google

CHAPTER XXII.

PROCEEDINGS TO COLLECT THE AMOUNT BID.

§ 313a. Power of chancery over bidders.
§ 313b. The first step against the purchaser in chancery.
§ 313c. Order against purchaser in chancery for amount of his bid.
§ 313d. Proceeding against purchaser in chancery by resale.
§ 313e. Proceeding against purchaser in chancery by resale to compel payment of a balance due.
§ 313f. Proceeding against purchaser in chancery by action at law.
§ 313g. Resale after sale under execution.
§ 313h. Action against purchaser at execution sale.

§ 313 a. Power of Chancery over Bidders.—A chancery sale is in legal effect a sale in which the court is the vendor; but it does not abide by the maxim that no one should be a judge in his own cause. On the contrary, it regards the bid of the purchaser as bringing him within its jurisdiction with respect to all matters connected with the sale;[1] and it thereafter deals with him in such a manner as will compel him, if possible, to comply with the terms of the sale. This it may do not merely to the extent of compelling the payment of the purchase price, when it is to be paid in money, but the court may also, through its power to bring the purchaser before it and to coerce him, if

[1] Requa v. Rea, 2 Paige, 339; Cazet v. Hubbell, 36 N. Y. 677; Gregory v. Tingley 18 Neb. 318; Shann v. Jones, 19 N. J. Eq. 251; Mosby v. Hunt, 9 Heisk. 675; Thornton v. Fairfax, 29 Gratt. 677; Ogilvie v. Richardson, 14 Wis. 157; Gross v. Pearcy, 2 Pat. & H. 483; Cowell v. Lippitt, 3 R. I. 92; Blackmore v. Barker, 2 Swan, 340; Stimson v. Mead, 2 R. I. 541; Gordon v. Saunders, 2 McCord Ch. 151; Wood v. Mann, 3 Sum. 318; State v. Quintard, 80 Fed. Rep. 829.

Digitized by Google

necessary, by attachment and imprisonment, compel him to perform any other condition of the sale, such, for instance, as the execution of any evidence of indebtedness, or any bond or mortgage required by the terms of the sale.[2]

If the purchaser assigns his bid, the assignee, by accepting the assignment, puts himself in the place of the original bidder, and becomes, to the same extent as was the latter, subject to the jurisdiction of the court. It may, therefore, compel him to pay any portion of the purchase price remaining unpaid, by the same course of proceeding which, but for the assignment, it could have employed against the original bidder.[3]

The court will, it seems, exercise its jurisdiction to the extent of compelling the purchaser to release any inequitable advantage he may have gained by stipulation with the parties interested, whereby they have received less than the amount actually due them. D., a young and inexperienced man, entitled to a legacy, brought suit to enforce its payment and obtain a decree directing the sale of certain lands. At the sale W. became the purchaser, and executed three notes for the purchase price, payable respectively in one, two, and three years. D., at sundry dates, executed orders in favor of W., entitling him to credits on the notes, and for these orders W. paid, or advanced, less than one-third of the amounts specified on them. Afterward D. filed a bill to be relieved from the effect of these orders, and to be charged only for the amounts actually advanced him thereon. In sustaining a decree granting the relief sought, the supreme court said: "It is in vain for the defendant to attempt to protect

[2] Brassfield v. Burgess (Ky.), 10 S. W. 122.

[3] Archer v. Archer, 155 N. Y. 415, 63 Am. St. Rep. 688.

Digitized by Google

himself from the consequences of such an assignment by alleging his ignorance of complainant's age and necessitous condition, the legal right he had to purchase an interest in the decree, and the inconvenience he may have been put to in advancing the money. A sufficient answer to all this, if there were none other, is, that the fund was yet in the custody of the court of chancery; that the defendant, by purchasing under the decree, had become a quasi party to the proceeding; that the court was competent to protect the fund against his rapacity, and would have done so upon application, by compelling him to pay the full amount of the orders before it would have decreed him the legal title to the land."[4]

§ 313b. The First Step Toward Compelling the Purchaser at a chancery sale to pay the amount of the bid is to obtain a report of the sale and to take the proceedings necessary for its confirmation.[5] It may happen, however, that the purchaser is irresponsible, or of such doubtful solvency that the parties interested may prefer to relinquish all claims against him. If so, a motion may be made for an order discharging him from his bidding, and directing a resale of the property. Unless the purchaser assents to the order, notice of the motion should be given to him, and it should be supported at the hearing by the facts upon which the moving party relies. If, on the other hand, it is thought desirable to proceed against the purchaser in the original suit, a choice may be had between two remedies; viz., between a proceeding against

[4] Deaderick v. Watkins, 8 Humph. 519.

[5] Ante, § 304a; Allred v. McGahagan, 39 Fla. 118; Campe v. Saucier, 68 Miss. 278, 24 Am. St. Rep. 273.

Digitized by Google

the purchaser for the amount of his bid, and a proceeding to resell the property, and then to pursue the purchaser for any loss which may result from the resale. In addition to these is the remedy by an action at law against the purchaser for the amount of the bid, or for the deficiency that may remain after a resale.

§ 313 c. Order for Purchaser to Pay the Amount of His Bid.—After a sale has been confirmed, "the court will, if required, make an order that the purchaser shall, within a given time, pay the money into court and be let into possession. Upon hearing the motion for this order, the court will, if the purchaser appears and asks for it, and has not precluded his right to object to the title, direct a reference to the master to inquire whether a good title can be made. The purchaser may also set up any claim he may have to compensation for any deficiency."[6] In the United States, as we have shown, all objections to title should be made before an order is entered confirming the sale,[7] except, perhaps, the objection that the proceedings are so defective in some essential particular as not to divest the title of the person or persons whose interests the court purports to sell.[8] We must admit, however, if the proceedings are in equity, either to obtain relief in an independent suit from a bond given for the purchase price, or upon motion to compel the purchaser to make payment of the amount of his bid, or to supply the deficiency which may remain after a resale, that the court is not, as a general rule, inclined to

[6] Daniell's Ch. Pr., 4th Am. ed., 1282, 1275.
[7] Ante, § 3041.
[8] Ormsby v. Terry, 6 Bush, 553; Tilton v. Pearson, 67 Ill. App. 372.

Digitized by Google

apply the strict rules of res judicata, and will even release or refuse to proceed against a purchaser where it is apparently inequitable to do so, as where he cannot be placed in immediate possession of the property purchased,[9] or land was included in the sale which had previously been conveyed by the defendant,[10] or when, through any fault of the complainant in the suit, title had not vested in the defendant,[11] or where the terms of the notice of sale implied a warranty of title when the title was, in fact, defective,[12] or sometimes, where, though there has been no warranty by the officer making the sale, it appears that the title to the property cannot be acquired as the result of the sale.[13] A purchaser has even been released on account of mistakes and misapprehensions for which none of the parties to the suit was at fault.[14] This is, however, granting an indulgence beyond that which the weight of authority sustains.[15]

It is, of course, also essential to the authorization of any proceeding against a purchaser that he be shown to be in default. This cannot be while he has complied with all the terms of the purchase on account of which compliance is then due,[16] nor, though he has not complied therewith, until some demand has been made upon him to do so.[17]

"The order for payment of purchase money, being

[9] Remsen v. Reese, 72 Hun, 370.
[10] Cooper v. Hargis (Ky.), 45 S. W. 112.
[11] McCord v. McGinty, 99 Ga. 301.
[12] Weems v. Love M. Co., 74 Miss. 831.
[13] Bird v. Smith (Ky.), 40 S. W. 571.
[14] Interstate N. B. v. O'Dwyer, 15 Tex. Civ. App. 33.
[15] Blanek v. Sadler, 153 N. Y. 551; Carneal v. Lynch, 91 Va. 114, 50 Am. St. Rep. 819.
[16] Fidelity etc. D. Co. v. Roanoke I. Co., 84 Fed. Rep. 752.
[17] McCall v. Irion, 41 La. Ann. 1126.

Digitized by Google

made, must be served personally upon the purchaser, and, if not complied with, may be enforced in the ordinary manner";[18] or, in other words, this order for the payment of the purchase money, when made, may be enforced by any means which might lawfully be employed to compel compliance with or to produce the satisfaction of any other decree for the payment of money. Hence, the purchaser may be attached and committed, as for a contempt of court.[19]

§ 313 d. Resale in Chancery.—If it is not thought advisable to proceed against the purchaser directly for the whole purchase price, an order may be obtained "that the estate be resold, and for the purchaser to pay as well the expenses arising from the noncompletion of the purchase, the application, and the resale, as also any deficiency in price arising upon the second sale."[20] This course of proceeding has the advantage that it employs the estate sold as a means of realizing as much as possible of the purchase price and the expenses of a resale; and it is now generally adopted both in England and the United States.[21] But the mere refusal or neglect of the purchaser to pay his bid does not warrant the officer in making a resale. The purchaser must be put in default by bringing him before the court by rule or motion, and calling upon him

[18] Daniell's Ch. Pr., 4th ed., 1283.

[19] Lansdown v. Elderton, 14 Ves. 512; Clarkson v. Read, 15 Gratt. 288; Anderson v. Foulke, 2 Har. & G. 346; Gordon v. Sims, 2 McCord Ch. 151; Brasher v. Cortlandt, 2 Johns. Ch. 505; Stout v. Phillippi M. Co., 41 W. Va. 339, 56 Am. St. Rep. 843; Camden v. Mayhew, 129 U. S. 73.

[20] Daniell's Ch. Pr. 1282; Harding v. Harding, 4 M. & C. 514.

[21] Hill v. Hill, 58 Ill. 239; Chase v. Joiner, 88 Tenn. 761; Stout v. Phillippi M. Co., 41 W. Va. 339, 56 Am. St. Rep. 843; Stuart v. Gay, 127 U. S. 518.

Digitized by Google

to complete the purchase, and allowing him an opportunity to show any cause he may have for not doing so.[22] The failure to give him notice of such motion is to leave the court without jurisdiction to act upon it so far as his rights are involved, and is fatal to any subsequent proceedings to compel him to make good the deficiency resulting from a resale.[23] The exaction of notice to the purchaser of the initiation of proceedings against him looking to the resale of the property and to making him answerable for any deficiency resulting therefrom, although the sale has been confirmed, and its existence and terms thereby established, implies, first, that he has a right to be warned of the measures about to be taken against him, that he may take such steps as are within his power to reduce the amount of damages for which he may be held liable, and, second, that he may urge reasons why the court should not exact from him the performance of his contract, or hold him responsible for his failure to perform. As the confirmation of the sale is itself a judicial determination of his liability, the strict application of the principles of res judicata would exclude the purchaser from urging in his behalf any matter existing anterior to the order of confirmation, and which, if then asserted, ought to have prevented the granting of such order. Courts of chancery, as we have already shown, are inclined to treat their jurisdiction of sales made by them as a continuing authority, and, hence, sometimes vacate such sales even after their regular confirmation, followed by the issuing of a deed to the

[22] Hill v. Hill, 58 Ill. 239; Matter of Yates, 6 Jones Eq. 212, 306; Tilton v. Pearson, 67 Ill. App. 372; Harbison v. Timmons, 139 Ill. 167.

[23] Green v. Ansley, 92 Ga. 647, 44 Am. St. Rep. 110; Ogden v. Davidson, 81 Va. 757; Stout v. Phillippi M. Co., 41 W. Va. 339, 56 Am. St. Rep. 843.

Digitized by Google

purchaser. Perhaps, upon the same principle, they have sometimes released, or refused to authorize proceedings against, a purchaser on account of causes existing anterior to the confirmation of the sale. It is, perhaps, not possible to state any general rule controlling this subject upon which the courts unanimously agree, but many of them appear disinclined to authorize proceedings against a purchaser under any circumstance which is deemed inequitable, as where a total or partial failure of title is shown, or any unfairness in the sale, or any mistake or misapprehension on the part of the purchaser rendering it inequitable to compel compliance with his bid.[24] There are courts, however, which apply the rule of caveat emptor to judicial sales, and, therefore, enforce the payment of the bid, though there is a defect or want of title.[25]

As to matters occurring subsequently to the granting of the order of confirmation and tending to show that the purchaser ought not to be held answerable, he is not embarrassed in his defense by the doctrine of res judicata. Thus, the difference between the amount realized at the first and second sale cannot be the equitable measure of his liability, unless the terms of the two sales are substantially, if not precisely, identical. Therefore, where it is sought to charge him with the deficiency resulting from a resale, the terms of such sale must be as nearly as possible those of the original sale.[26]

[24] Ante, § 313c; Clay v. Kagelmacher, 98 Ga. 149; Re Rogge's Succession, 49 La. Ann. 37; Howlett v. Central etc. Co., 50 S. C. 1; Etter v. Scott, 90 Va. 762.

[25] Humphrey v. Wade, 84 Ky. 391; Preston v. Breckinridge, 86 Ky. 619; Latimer v. Wharton, 41 S. C. 508, 44 Am. St. Rep. 739.

[26] Shinn v. Roberts, 20 N. J. Eq. 435, 43 Am. Dec. 636, Riggs v. Pursell, 74 N. Y. 370; Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167; Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125;

Digitized by Google

Otherwise the purchaser is not answerable for the deficiency. The reason for this is obvious. For if the terms were made more onerous or less inviting to bidders, a larger deficiency would probably result. If the purchaser has not paid any instalment of the purchase money, he will receive no part of any surplus which results from the second sale being for a greater amount than the first, but will be exonerated from the payment of costs.[27]

§ 313 e. Resale in Equity to Compel Payment of Instalments.—In some parts of the United States, the practice prevails of selling property in chancery and giving time for payment of part of the purchase money, the purchaser entering into some bond or other obligation, sometimes with and sometimes without sureties, for the payment of the balance due, either in one payment or in instalments. The sureties, as well as the purchaser, become quasi parties to the suit, and may be compelled by attachment, and such other remedies as may be available against a purchaser, to pay the amounts for which they have become sureties.[28] It is well settled that though part of the purchase price has been paid, the court retains jurisdiction to compel the payment of the residue as it falls due, and may, upon motion, and after notice to the purchaser, enter an order that the premises be resold to pay an instalment which is past due,[29] and that it need not first resort to collateral securities which can be col-

Ramsay v. Hersker, 153 Pa. St. 480; Connell v. Shyrock, 167 Pa. St. 483.

[27] Miltenberger v. Hill, 17 La. Ann. 52.

[28] Wood v. Mann, 3 Sum. 318.

[29] Clarkson v. Read, 15 Gratt. 288; Stephens v. Magruder, 31 Md. 168.

Digitized by Google

lected only by suit.[30] In Tennessee, the motion for such an order may be made ex parte, in which event the purchaser may subsequently apply to the court and be relieved from the order if he can show any sufficient cause therefor.[31] But if the court has confirmed the sale, and a decree has been entered vesting title in the purchaser, it has been held that the jurisdiction over the purchaser is exhausted, and that remedies to compel the payment of any purchase money remaining unpaid must be prosecuted in another suit.[32] In Virginia, the fact that the purchaser has obtained a conveyance from the officer who made the sale is not conclusive. He may be proceeded against by rule, on the ground that such conveyance was procured by false representations, and without the payment in fact of the moneys due.[33] Where part only of the purchase money has been paid, the court ought not to authorize a conveyance to be made, reserving a mere lien; but should retain the legal title, in order that the remedy by motion to compel the payment of the residue may not be impaired.[34] In proceeding to compel the payment of a balance due, the court should, upon motion and notice to the purchaser, ascertain and declare the amount remaining unpaid, and enter an order appointing a day, on or before which such amount may be paid, and directing the commissioner to resell the property unless such payment should be made within the time allowed.[35] If the property realizes more than

[30] Mosby v. Withers, 80 Va. 82.

[31] Blackmore v. Barker, 2 Swan. 340; Still v. Boon. 5 Sneed. 379.

[32] Vanbibber v. Sawyer, 10 Humph. 81, 51 Am. Dec. 694; Glenn v. Blackford, 23 W. Va. 185.

[33] Williams v. Blakey, 76 Va. 254.

[34] Glenn v. Blackford, 23 W. Va. 185; Fleming v. Roberts, 84 N. C. 532.

[35] Long v. Weller, 29 Gratt. 347; Kyles v. Tait, 6 Gratt. 44.

Digitized by Google

sufficient to pay the purchase money remaining unpaid, the purchaser is entitled to the surplus.[36]

§ 313f. Action Against Purchaser at a Chancery Sale.—The existence of summary remedies against purchasers at chancery sales, by motion, has very naturally occasioned actions at law to be very rarely resorted to against such purchasers. It has been intimated by very eminent jurists that a court of law would not entertain such an action.[37] If notes, bonds, or other evidences of debt are given, they can unquestionably be sued upon at law.[38] But even where none are given, there is a contract on the part of the purchaser that he will comply with the terms of the sale. If he does not do so, he is liable to an action at law, brought by and in the name of the master, commissioner, sheriff, or other officer by whom the sale was made, either for the amount of the bid or for the deficiency resulting from a resale.[39] It is manifest that if the order of resale was obtained after due notice to the purchaser, the only defense open to him in an action at law must relate to matters occurring after the entry of the order of resale, and must tend to show either that that order has not been complied with, because the second sale was not made in con-

[36] Brundige v. Morrison, 56 Md. 407; Stephens v. Magruder, 31 Md. 168.

[37] Wood v. Mann, 3 Sum. 318; Richardson v. Jones, 3 Gill & J. 163, 22 Am. Dec. 293; Marsh v. Nimocks, 122 N. C. 478, 65 Am. St. Rep. 715.

[38] Farmers' & P. Bank v. Martin, 7 Md. 342, 61 Am. Dec. 350; Blair v. Core, 29 W. Va. 477.

[39] Townshend v. Simon, 38 N. J. L. 239; Shinn v. Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Cobb v. Wood, 8 Cush. 228; Michenor v. Lloyd, 16 N. J. Eq. 41; Bowne v. Ritter, 26 N. J. Eq. 456; Galpin v. Lamb, 29 Ohio St. 529; Miltenberger v. Hill, 17 La. Ann. 52; Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167.

Digitized by Google

formity with the terms of the first sale, or has been attended by some misconduct by means of which the biddings were depressed and the property prevented from selling at a price which it would otherwise have realized. When the terms of both sales are evidenced by the orders directing them, by the returns of sale, and by the respective decrees of confirmation, it would seem that the purchaser should be bound thereby, and should not be at liberty to urge that conditions were attached to the first sale by the officer making it which did not attend the second, and, therefore, that the purchaser is released because the terms of the two sales were different. The contrary, however, has been declared by a recent decision in California, in which it was held, in effect, that the purchaser might urge in his defense anything showing it to be inequitable to enforce his contract of purchase, and, hence, that he might prove that he was led to bid at the first sale more than he would otherwise have bid, because he was assured that the title was perfect, and that he could not be liable for a deficiency resulting at the second sale whereat the purchaser was informed that he must take the title as it was, whether defective or not.[40] It is obvious in this case that if the purchaser had urged, in opposition to the confirmation of the sale, the facts which he afterward relied upon to defeat the action against him, such sale ought not to have been confirmed, and that its confirmation was, in effect, an adjudication that it was made upon the terms reported to, and confirmed by, the court, and not otherwise, and, hence, that the conclusion sustained in the action at law necessarily involved a denial of the effect

[40] Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167; Black v. Walton, 32 Ark. 321.

Digitized by Google

of the order of confirmation. We think that the weight of authority does not sustain this decision, and that in defense to an action of the character here under consideration the defendant ought not to be permitted to show that the terms of the sale were other than those asserted by the report and confirmation thereof. Thus, where the purchaser insisted that with the parcels described in the order of confirmation there was in fact included at the sale another parcel, he was held to be bound by the confirmation, and estopped from asserting that there was sold to him a lot in addition to those described in the order of confirmation.[41] Though the terms upon which the sale was ordered gave the purchaser the right to have the tract surveyed, and his bid was in the report and confirmation designated as a specified sum, it was held that he was not thereafter entitled to insist that he was liable only for the number of acres actually contained in the tract.[42] A purchaser, therefore, after confirmation cannot obtain relief on the ground that the title was imperfect or encumbered,[43] nor that the lands were not situate in the township in which they were described to be in the levy and notice of sale,[44] nor that by the contract of sale he was entitled to certain valuable water privileges which he failed to get,[45] nor that the lots were advertised as dry lands, and purchased in the belief that they were such, when, in fact, they were under water,[46] nor that there was a deficiency

41 Barron v. Mullin, 21 Minn. 376.

42 Sackett v. Twining, 18 Pa. St. 199, 57 Am. Dec. 599.

43 Threlkelds v. Campbell, 2 Gratt. 198, 44 Am. Dec. 384; Young v. McClung, 9 Gratt. 358; The Monte Allegro, 9 Wheat. 644.

44 Cooper v. Borrall, 10 Pa. St. 491.

45 Long v. Weller, 29 Gratt. 352.

46 Mechanics' S. B. & L. A. v. O'Connor, 29 Oh. St. 655.

Digitized by Google

in the quantity of land sold.[47] Further, the case of Brummagin v. Andrews, 48 Cal. 366, ought to be sufficient upon this subject. The defendant there offered to show that at the time of the sale the administrator represented that the title to the land was valid, and that one Reay, who claimed to be in possession and to own the property, had no interest in it, and that the bid by the purchaser was made in reliance on these statements; that after the sale, finding these statements to be untrue, the purchaser applied to the administrator, who thereupon returned to him the amount of his deposit, and released him from the payment of his bid. A resale was subsequently made, and a deficiency resulted. To an action to recover the amount of this deficiency, the defense above indicated was interposed. The court, speaking of the defendant, said: "He has had his day in court, and if he had appeared and proved to the satisfaction of that court the facts which he offered to prove on the trial in this action, he would doubtless have escaped the subsequent litigation."

§ 313g. Resale after a Sale under Execution.— The purchaser at an execution sale does not thereby become a quasi party to the action, to the extent that he may be proceeded against summarily or punished as for a contempt of court on neglecting or refusing to comply with his bid. The sale to him is generally perfect, and does not need the approval of the court to entitle him to the rights nor to subject him to the obligations of a purchaser. If the purchaser fails or refuses to pay the amount of his bid, the officer should resell the property, and need not first make a return of

[47] Dresbach v. Stein, 41 Oh. St. 70.

Digitized by Google

his proceedings, nor ask for any order of court.[48] The practice with respect to the resale is not uniform. In Nebraska it appears to be the duty of the sheriff, in the event of the nonpayment of the bid, "to at once resell the property. He cannot wait until the sale is closed and the bidders have departed before again offering the property for sale."[49] In those states whose statutes provide that execution sales shall take place between specified hours of the day, if a bidder refuses or fails, after demand, to make payment, a resale may be made on the same day and within those hours and without any additional notice.[50] The sheriff may, no doubt, immediately upon the acceptance of the bid, demand payment, and in case it is not made, then and there resell the property.[51] A sale so made would take place in the presence of the persons assembled for the first sale, and might fairly be assumed to be for as large a sum as would have been realized but for the abortive bid. But even when the resale does not immediately take place, it may, in many of the states, be without any readvertisement,[52] and without giving the purchaser any notice of when or where it will be made.[53] Though a resale takes place at a time long subsequent to the original sale, it is not necessary to make another levy upon the property sold.[54] It is obvious that the officer may easily act in an oppressive

[48] Thompson v. McManama, 2 Dan. 213; Bisbee v. Hall, 3 Ohio, 449.

[49] Jones v. Null, 9 Neb. 254.

[50] Humphrey v. McGill, 59 Ga. 649.

[51] Durnford v. Degruys, 8 Mart. (La.) 220, 13 Am. Dec. 285; Minter v. Dent, 2 Bail. 291; Wilson v. Loring, 7 Mass. 392; May v. Sturdivant, 75 Ia. 116, 9 Am. St. Rep. 463.

[52] Illingworth v. Miltenberger, 11 Mo. 80.

[53] Gaskell v. Morris, 7 Watts & S. 32.

[54] Croacher v. Oesting, 143 Mass. 195.

Digitized by Google

manner toward the purchaser, if he may, after accepting the bid and seeming to be satisfied with the bidder, have a resale made, without giving any notice, or making any demand for payment. In Missouri a resale ought not to be made on the day of the original sale, without first demanding payment.[55] In Pennsylvania an action for the loss occasioned by a resale cannot be sustained unless payment was demanded, or the purchaser neglected to make payment until after the return day of the writ.[56] And in Illinois and Missouri there must be a distinct demand for the purchase money, and a tender of the deed or certificate of sale, in all cases where lands have been sold, and the purchaser must be given to understand that a resale will be made, and that he will be held answerable for any loss in the price resulting from such resale.[57]

§ 313h. Remedy by Action Against Purchaser at Execution Sale.—If property has been sold upon execution, it may, as we have shown, be resold, with the view of proceeding against the purchaser for any deficiency or loss which may result from the resale. The sheriff may, however, choose to waive his right to resell. If so, he may maintain an action for the full amount of the bid.[58] According to some of the au-

[55] Conway v. Nolte, 11 Mo. 74.

[56] Holdship v. Doran, 2 Penr. & W. 9; Vastine v. Fury, 2 Serg. & R. 426.

[57] Maulding v. Steele, 105 Ill. 644; Shaw v. Potter, 50 Mo. 281; Phillips v. Goldman, 75 Mo. 686.

[58] Webb v. Perkins, 60 Ill. App. 91; Jones v. Null, 9 Neb. 254; Davis v. Baxter, 5 Watts, 515; Armstrong v. Vroman, 11 Minn. 220, 88 Am. Dec. 81; McKee v. Lineberger, 69 N. C. 217. In North Carolina, this is the only remedy, for the officer cannot there resell and sue for the deficiency merely. Grier v. Yontz, 5 Jones, 371; Tate v. Greenlee, 4 Dev. 149.

Digitized by Google

thorities, the cause of action is not complete until the officer has tendered a deed to the purchaser;[59] while others maintain that it is perfect as soon as the bid is accepted, on the ground that an execution sale is never made on credit, and that not until the purchase price is paid is it the duty of the officer to execute a deed.[60] If, on the other hand, a resale has taken place, an action may be sustained against the purchaser for the deficiency.[61]

Whether the action be for the whole purchase price, or for the deficiency resulting from a resale, it may, and we think must, be in the name of the sheriff, or other officer conducting the sale;[62] and it can be maintained against no one but the purchaser,[63] although the latter has assigned his bid, or claims to have been acting as agent for another.[64] The judgment creditor cannot sustain the action, because there is no privity of contract between him and the purchaser.[65] Where the action is brought after a resale, a recovery may be had of the difference between the amount realized at the resale and the amount bid at the first sale,[66] to-

[59] McKee v. Lineberger, 69 N. C. 217; Hunt v. Gregg, 8 Blackf. 105.

[60] Holdship v. Doran, 2 Penr. & W. 9; Negley v. Stewart, 10 Serg. & R. 207.

[61] Sharman v. Walker, 68 Ga. 148; Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; Kershaw v. Dyer, 6 Utah, 239; Hughes v. Miller, 186 Pa. St. 375.

[62] Adams v. Adams, 4 Watts, 160; Gaskell v. Morris, 7 Watts & S. 32; McKee v. Lineberger, 69 N. C. 217; Townshend v. Simon, 38 N. J. L. 239; Freeman v. Husband, 77 Pa. St. 389.

[63] Wimer v. Obear, 23 Mo. 242.

[64] Gray v. Case, 51 Mo. 463; Chappell v. Dann, 21 Barb. 17.

[65] Galpin v. Lamb, 29 Ohio St. 529; Adams v. Adams, 4 Watts, 160; Harvey v. Adams, 9 Lea, 289; Gaskell v. Morris, 7 Watts & S. 32.

[66] Girard v. Taggart, 5 Serg. & R. 19; Adams v. McMillan, 7 Port. 73.

Digitized by Google

gether with the costs of the second sale;[67] but it is said that the jury are not bound by this measure of damages, but may award more or less, as the circumstances of the case may, in their judgment, require. In addition to the costs of the second sale, the purchaser is answerable for any absolutely necessary and proper expenditures attendant upon the keeping and storage of the property pending the readvertisement and sale thereof.[68] He is entitled to be credited with any sum paid by him at the time of the sale, though the published terms therefor declared that if a bidder does not comply with the sale, he shall forfeit the amount bid and paid.[69]

Matters which the purchaser could have urged in opposition to the motion to confirm the sale are, by his failure to urge them, waived, and cannot avail him as defenses to an action for the loss resulting from a resale.[70] In fact, almost the only defenses to such an action are, that the defendant was not the purchaser,[71] or that, through some defect in the judgment or proceedings, the sale was so void when made that it could not divest the title of the judgment debtor,[72] or that

[67] Coffman v. Hampton, 2 Watts & S. 377, 37 Am. Dec. 511.

[68] Barnes v. Bluthenthal, 101 Ga. 598, 65 Am. St. Rep. 339.

[69] Bailey v. Dalrymple, 47 N. J. Ch. 81.

[70] Threlkelds v. Campbell, 2 Gratt. 198, 44 Am. Dec. 384; Young v. McClung, 9 Gratt. 336; Cooper v. Borrall, 10 Pa. St. 491.

[71] But a person who permits his name to be put down as a bidder will not be released on the pretense that he acted for another. Gray v. Case, 51 Mo. 463.

[72] Jones v. Grant, 34 Miss. 592. The purchaser at an execution or other compulsory sale can compel no warranty of title, nor can he, ordinarily, avoid the payment of his bid on the ground that the defendant had no title. But the purchaser is always entitled to such interest as the defendant had. Hence, if the proceedings are so defective that they do not operate to transfer such title as the defendant may have; or if a specified parcel of property, or some designated estate therein, is directed to be sold, and is then sold,

Digitized by Google

the terms of the sale differed from those of the original sale. A purchaser cannot successfully defend on the ground that he made his bid through some mistake of law or of fact,[73] or that the judgment creditor owes him, and the amount of this debt should be credited on the bid.[74] Where the purchaser cannot insist upon his rights, he cannot be compelled to complete the sale; for there should be no obligation where there is no corresponding right.[75] The officer conducting the sale has no authority to make any warranty of title. If he should undertake to do so, or should make any false representations, his conduct in this respect might, perhaps, afford the purchaser a cause of action against him; but it would furnish no legal excuse for the non-payment of the bid.[76] Sales under execution always assume to be of all the title and interest of the defendant in the writ. If a sale from any cause is so void that it cannot transfer this title and interest, the purchaser is not bound by his bid, and may successfully resist any action seeking its enforcement.[77] If, however, the defendant had no interest whatever in the

and the purchaser cannot obtain the property or estate, owing to defects in the proceedings—he will not, in either case, be required to pay his bid. In such cases, his defense is maintainable, not because he was sold a worthless title, but because the title, whatever it may prove to be, cannot be transferred to him by the sale. Boggs v. Hargrave, 16 Cal. 566, 76 Am. Dec. 561; Darvin v. Hatfield, 4 Sand. 468; Kohler v. Kohler, 2 Edw. Ch. 69; Post v. Leet, 8 Paige, 337; Seaman v. Hicks, 8 Paige, 655; Brown v. Frost, 10 Paige, 243; Burton v. Lies, 21 Cal. 88; Shiveley v. Jones, 6 B. Mon. 275. A purchaser cannot avoid payment on the ground that the property has been destroyed by fire since the sale. Vance v. Foster, 9 Bush, 389.

[73] Pinkston v. Harrell, 106 Ga. 102, 71 Am. St. Rep. 242.

[74] Perkins v. Webb, 67 Ill. App. 474.

[75] Talley v. Starke, 6 Gratt. 339.

[76] Hensley v. Baker, 10 Mo. 157.

[77] Commissioner v. Smith, 10 Watts, 392; Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 561.

Digitized by Google

property, or an interest of less value than the purchaser supposed, this fact constitutes no defense to an action for the purchase price.[78] Caveat emptor is the rule of execution sales, both at law [79] and in equity.[80] If, upon the resale, the property sells for sufficient to satisfy the execution, it has been held that no action can be sustained against the original purchaser for the loss of the resale.[81] If this be so, there is an obvious defect in the statute. For while, in such a case, the plaintiff suffers no injury, it is clear that with the defendant it is otherwise, and his interests ought to be guarded as jealously as those of the plaintiff. In some of the states, a statutory remedy has been given against purchasers at execution sales, whereby, after a resale, they may be brought before the court on motion and a judgment entered against them for the amount of the deficiency.[82]

[78] McCartney v. King, 25 Ala. 681; Halleck v. Guy, 9 Cal. 181, 70 Am. Dec. 643; Islay v. Stewart, 4 Dev. & B. 160; Moore v. Akin, 2 Hill (S. C.), 403; Hand v. Grant, 10 Smedes & M. 514, 48 Am. Dec. 528; Smith v. Painter, 5 Serg. & R. 223, 9 Am. Dec. 344; Friedly v. Scheetz, 9 Serg. & R. 156, 11 Am. Dec. 691; Weidler v. Farmers' Bank, 11 Serg. & R. 134; Cameron v. Logan, 8 Iowa, 434; Dean v. Morris, 4 G. Greene, 312; Rodgers v. Smith, 2 Cart. 526; Dunn v. Frazier, 8 Blackf. 432.

[79] England v. Clark, 4 Scam. 486; Freeman v. Caldwell, 10 Watts, 9; Miller v. Fitch, 7 Watts & S. 366; Bostick v. Winton, 1 Sneed, 524; Pinkston v. Harrell, 106 Ga. 102, 71 Am. St. Rep. 242; Long v. McKissick, 50 S. C. 228.

[80] Williams v. Glenn, 87 Ky. 87, 12 Am. St. Rep. 461; Lang v. Waring, 25 Ala. 625; 69 Am. Dec. 533.

[81] Reed v. Shepperd, 38 Mo. 463; see Roberts v. Westbrook, 1 Cold. 115.

[82] Hensley v. Baker, 10 Mo. 157; Phillips v. Goldman, 75 Mo. 686; Williams v. Lines, 7 Blackf. 46.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

3 6105 063 156 587

Digitized by Google

Digitized by Google